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JURIDICAL REVIEW

LEGAL THOUGHT IN EIGHTEENTH-CENTURY SCOTLAND [1]

WHEN a pupil is appointed to succeed his master in any office it is natural that his feeling of honour should be tempered by humility. But when the master is a scholar of the calibre of David Daube, the pupil must exert himself to prevent his humility from degenerating into despair. Professor Daube occupied the Chair of Jurisprudence as its first incumbent for only four years, and during much of that time his work was impeded by ill-health. Yet he has established clear and abiding standards of scholarship for his successors to emulate. It will be my aim to ensure that, during my tenure of the Chair, the study of Roman Law and Jurisprudence in this University will be carried on in conformity with those standards.

The teacher of Jurisprudence has a special responsibility both to his students and to society. For whereas in other courses the law student is taught the rules of the legal system and the way in which these rules are applied to situations of fact, the purpose of the Jurisprudence course is to study the phenomenon of law as a whole and its relation to society. Its aim is to enable the student, who for most of his professional life will be immersed in the minutiae of practice, to think about his rôle in society—to stand back for a moment from the trees and look at the wood. Thus the teacher of Jurisprudence may inculcate a particular attitude to law in his students and this attitude, though it may not figure prominently in their conversation and indeed may be unconscious, will assuredly influence their behaviour in the practice of their profession.

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[1] An inaugural lecture delivered before the University of Aberdeen on November 9, 1956.

In deciding the way in which he should present the phenomenon of law, the teacher of Jurisprudence must be guided, apart from his personal predilections, by any conception of law which may be traditional in the legal system which his students are learning and which they will in future practise. As Scots law is a system quite distinct from any other system, it may be assumed *a priori* that there is a distinctive Scottish attitude to the phenomenon of law. But though it may be presumed to exist, it is not easy to find. Twenty years ago, in the first volume of the Stair Society Publications, Mr. Kermack wrote,[2] "The development of legal philosophy is one of those subjects the Scottish contribution to which has been forgotten by her lawyers to their own loss." So the outsider, who has not been brought up in Scots law and has not had the opportunity of absorbing unconsciously its distinctive attitude, must look for it in the writings of the past. Elsewhere, lawyers as a class do not write much, but when they do, they write about law. In Scotland, lawyers have been major contributors to the literature of the country but their muse favours the writing of novels, biographies, memoirs, philosophical tracts, literary criticism, agricultural handbooks—works on almost every subject except the law ; so our search is complicated. Clearly it is necessary to concentrate on a limited period, and the question arises, Which period is most significant for finding the distinctive features of Scottish thought on law?

In this University the teaching of Jurisprudence is combined with that of Roman law, so I feel justified in taking as a guide a parallel from the history of that system. The city of Rome was founded in the eighth century B.C. and thirteen centuries passed before the Corpus Juris Civilis, the great repository of Roman law, was compiled under the orders of the Emperor Justinian. But the unique quality of Roman law was entirely due to the activities of the lawyers of about two centuries, from the first to the third centuries A.D. It was in this period—the classical period—that the Roman law was given the distinctive features which made it the greatest intellectual legacy left by the Romans. So when we seek the characteristics of Roman law we go to the classical period.

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[2] *Sources and Literature of Scots Law* (1936), 439.

What is the classical period of Scots law? The word "classic," says T. S. Eliot,[3] suggests maturity. It seems that Scots law can first be regarded as a mature system in the latter part of the eighteenth century. It had received its first synthetic statement from Lord Stair at the end of the seventeenth century. He laid out the foundations, and on his base the lawyers of the next hundred years gradually built up a structure of rules, having the distinctive features which can be recognised in the Scots law of today. The basic conceptions were given precision in the period from Erskine to Bell. After this comes what we may call the post-classical period. This was characterised in Rome by a relative decline in legal science and a considerable infiltration of foreign ideas often inconsistent with the basic conceptions as worked out in the classical period, and I think one can see the same thing happening in Scotland. At the end of the post-classical period in Rome there was a recovery marked by a classicizing tendency and accompanied by a revival of the academic study of law. I suggest we have reached a similar stage here today. So a search for the distinctive features of the Scottish view of law should begin with the eighteenth century.

Thought about law in the first half of that century still reflected the ideas of Lord Stair and they must therefore be considered first.

Stair's aim in publishing his *Institutions* of 1681 was both to provide a compendium of the rules of Scots law of his time and also to show how those rules formed a coherent and logical whole. Law, he maintained, could be studied as a rational discipline, having principles from which its conclusions might be deduced, and not as a mere collection of authorities. Thus he had partly a propagandist aim, to emphasise the quadrancy of the Scottish administration of justice to the common dictates of reason.[4] As we might expect from one who had been a teacher of philosophy, his work shows that he was familiar with the doctrines of the leading writers of the contemporary Protestant revival of natural law on the Continent,—in particular Grotius and Pufendorf. His definition of law echoes that of Grotius, " Law is the dictate of reason determining every rational being to that which is congruent and convenient for the nature and condition thereof."[5] But Stair differs from these continental natural lawyers in two significant respects. First, they held, though they were for the most part devoutly religious, that a rational theory of law could be independent of theological assumptions. Although the obligation to obey natural law might come from God, yet the whole contents of natural law could be ascertained by logical deduction from man's nature as a rational being. Stair did not go along with them in this view. He was attached to the Presbyterian form of Protestantism, and the sincerity of his attachment was demonstrated by his refusal to take the Test. In the Westminster Confession of Faith accepted by the Church of Scotland, the freedom of the human will and the doctrine of divine predestination are asserted side by side, free will in Chapter IX and effectual calling in Chapter X. So the natural lawyer had to walk warily. He might incur the displeasure of the Church Authorities if, by giving undue prominence to the rôle of reason, he denied that the principles of human action come directly from God. Or he might antagonise them, as did later Lord Kames, by asserting a strict necessitarianism—by holding that the freedom of the human will is illusion and that Man is bound by a necessity in the nature and constitution of things. For in either case he would be denying that God is the principle of order in the universe.[6] He would be elevating the law above God: he would be putting man out of immediate relation with the Highest. Stair adopted a middle line.[7] We can assume that God will act according to reason, that His law is rational. But law is founded primarily on the will of God. Reason is rather a subsidiary instrument. " Divine law is that mainly which is written in men's hearts . . . Such are the common practical principles, that God is to be obeyed, parents honoured, ourselves defended, violence repulsed, children to be loved, educated and provided for." [8] Reason was given to man that from these principles he might deduce God's law in more particular cases. As Professor Campbell puts it,[9] " Stair was still prepared to rely on God at an indefinite number of points as the author of an indefinite number of principles of human action, which are directly known without reasoning or experience, which therefore do not require logical proof of their validity."

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[3] *What is a Classic?* (1945), 10.

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[4] Dedication.

[5] I.I. 1.

Stair also seems to deviate from the continental natural lawyers in a second respect. They not only tended towards a secular set of natural law principles—they held further that from these principles a complete and self-sufficient system could be deduced by logic. The most detailed solutions could be derived from the smallest number of postulates. Their view is illustrated by the attraction they felt for mathematical analogy. Grotius had averred [10] that " just as the mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact." This Stair did not do. Despite his predilection for reason, he did not admit that reason alone, working on the principles implanted by God, could provide a satisfactory legal system. His attitude corresponded rather with that of the philosopher in Hobbes's Dialogue between a Philosopher and a Student of the Common Laws of England [11]; the Lawyer asks, "What makes you say that the study of the law is less rational than the study of mathematics?" And the Philosopher replies, "I say not that; for all study is rational or nothing worth: but I say, that the great masters of mathematics do not so often err as the greatest professors of law." Stair did not agree with much of Hobbes's ideas. But I think he would have recognised the truth of the Philosopher's observation. Although he apologises for it, Stair admits [12] that some of his work is asserted on mere authority—for no other reason but *quia majoribus placuerunt.* For no legal system can dispense with authority completely. Take his attitude to customary law.[13] The happiest nations are those whose laws have been wrung out over a long period from debates upon particular cases until they reach the consistence of a fixed and known custom. For in this way the inconveniences of a rule are seen experimentally and can be easily avoided before the rule attains the maturity of a law. When the law is not hardened into a statute, greater discretion is left to the judge. At first the people run some hazard of their judges' arbitrement, "yet when that law is come to a full consistence, they have the advantage in this, that what custom hath changed is thrown away and obliterate without memory or mention of it. But in statutory written law the vestiges of all the alterations remain, and ordinarily increase to such a mass that they cease to be . . . securities to the people and become labyrinths, wherein they are fain to lose their rights, if not themselves." Clearly Stair favours a system in which the bulk of the law is stated in judicial decisions and he would not have advocated codification.

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[6] James Walker, *Scottish Theology and Theologians* (1888), 65.

[7] A. H. Campbell, *The Structure of Stair's Institutions* (1954), 28.

[8] I.I. 3.

[9] *Loc. cit.*

[10] *De Jure Belli ac Pacis*, Prolegomena, 58 cited by A. P. D'Entrèves, *Natural Law*, 53.

Stair was pre-eminently a practical lawyer and he sometimes felt that the approach of Grotius to actual problems was too idealistic. Take for example his discussion [14] of the question whether in permutative contracts, *i.e.*, contracts in which one thing is exchanged for another, such as sale, " there be a moral necessity to keep an exact equality and that whosoever *ex post facto* shall be found to have made an unequal bargain, the gainer ought to repay the loser." Grotius[15] thought that where A had bought something from B at a price far greater than its actual value, there was a moral necessity for B to compensate A, even though B, the gainer, had been guilty of no deception or malpractice. Stair, on the other hand, recognised that such a principle could not work in a mercantile society and pointed out that fraud and latent defect apart, " the equality required in these contracts cannot be in any other ratio than that the parties decide."

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[11] *Works* (1840), Vol. VI, 3.

[12] Dedication.

[13] I.I. 15.

[14] I.X. 14.

There is a tendency to express the problem of the nature of law as a dichotomy, the formula being, law is not x but y. The history of legal thought is littered with aphorisms like: law is not *jussum* but *justum*; law is not made but found; law is not logic but experience. Stair was aware that these are false dichotomies; that law is neither entirely logic nor entirely experience but a mysterious mixture of the two. We can still learn from Stair that we should not be deluded by misleading maxims of this kind.

Stair's conception of law governed legal thought in Scotland for the first half of the eighteenth century. Even in 1773, when Erskine's *Institute of the Law of Scotland* was published, the first part, where he treats of Laws in general, still follows the line laid down by Stair. He does, however, adopt a Grotian view when he says[16] that the law of nature is not made known by any formal notification of God's will but is impressed on men's minds by the internal suggestion of reason. Erskine was less interested in the laws in general than in the substance of the law which had developed considerably since Stair; for to mention only two points, heritable jurisdictions had been abolished, and the foundations of commercial law had been laid in the practice of the merchants and the decisions of the court.[17] But there is one little sentence which shows the influence of a conception of the law which had become popular since Stair. That is where Erskine, discussing the relation between natural law and positive law, observes [18] that "positive law is not, like the law of nature, immutable, but may and indeed in many cases ought to be altered or abrogated according to the changes wrought by time on the riches, commerce or manners of the people."

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[15] *De Jure Belli ac Pacis*. II.12.11.

[16] I.I. 7.

In the last phrase speaks the voice of Montesquieu. The publication of his great work on the Spirit of the Laws in 1748 marks the watershed which divides the conception of law as reason from the idea of law as originating in the circumstances of society. While recognising that reason is an attribute common to all men, Montesquieu pointed out that when reason was applied to find solutions for the special requirements of different nations, it had to take account of many things—the climate, the soil, the main occupations of the inhabitants, their religion, inclinations, manners, customs. So universal solutions were impossible.[19] This way of looking at law is common-place today. The exposition of any legal system is expected to take account of what Professor Kaser in a recent textbook on Roman law calls [20] the "moral, religious, cultural, political, economic and social forces which have contributed to the formation of the law."

But before Montesquieu, such a view of law was unusual. There is barely a hint of it in Stair. It is appropriate that today, when we have but recently been commemorating the 200th anniversary of his death, we should remember the enthusiasm with which Montesquieu's work was received in Scotland (an English translation was published in Aberdeen in 1756). For if his influence is only just visible in Erskine, it made a great impact on a group of more philosophical thinkers, of whom the most prominent at the time was probably Lord Kames.

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[17] Ae. J. G. Mackay, *Memoir of Sir James Dalrymple, first Viscount Stair*, 172.
[18] I.I. 20.
[19] See Isaiah Berlin, *Montesquieu*, Proc.Brit.Acad. Vol. XLI (1955), 267–296.
[20] *Das römische Privatrecht* (1955), ix.

Kames was a typical eighteenth-century figure[21]; vigorous mentally and physically, curious about all manner of topics, optimistic about his ability to improve the world. It is characteristic of him that in his eightieth year he turned away from discussion of the elements of criticism and the principles of morality and published " The Gentleman Farmer, being an attempt to improve agriculture by subjecting it to the test of rational principles." But he was by profession a lawyer and was a Lord of Session for thirty years, so that his views on law carry especial authority.

Opening a Kames tract, the reader is immediately struck by the contrast between Kames's manner and the cool, reasoned, smoothly running periods of Stair. Kames addresses the reader as if he were a public meeting. In his *Elucidations respecting the Law of Scotland*[22] he is deprecating the way legal studies are conducted. " No science," he declares, " affords more opportunity for exerting the reasoning faculty than that of law; and yet in no other science is authority so prevalent." " What are our law-books," he cries, " but a mass of naked propositions drawn chiefly from the decisions of our supreme courts, rarely connected either with premise or consequences? "[23] Even Stair's *Institutions* are not without fault in Kames's eyes. " Stair tends to cite decisions as all of equal authority, though they are not always concordant." As a result, law students, trained to rely on authority, seldom think of questioning what they read: " they husband their reasoning faculty as if it would rust by exercise." Professors of law, of course, get short shrift.[24] " They load the weak mind with a heap of uninteresting facts, without giving any exercise to the judgment." Kames, as a practical lawyer, does not wish to exclude authority altogether.[25] "The authority of men of eminence has deservedly great weight; for nature gives its weight. But authority ought to be subservient to reason; which the God of nature has bestowed on man as his chief guide in thinking as well as in acting." Authority then there must be: what Kames condemned was too rigid an adherence to authority and precedent by those who failed to see the principle behind the decision. In this respect Kames would have concurred in the robust opinion of one of his predecessors on the Court of Session bench, who is reported by Fountainhall to have declared, "There be some judges like the bishop who, having begun to eat the asparagus from the wrong end, will not desist."[26]

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[21] See Fraser Tytler (Lord Woodhouselee), *Memoirs of the Life and Writings of Lord Kames*, 2nd ed., in 3 Vols. 1814.

[22] Edinburgh, 1777, Preface.

[23] p. vii.

[24] p. ix.

It is important to see the exact nature of Kames's championship of the cause of reason in the law. He was not in fact appealing primarily for a greater application of logic. His meaning becomes clear in his remark[27] that "Law becomes then only a rational study when it is traced historically from its first rudiments among savages, through successive changes, to its highest improvements in a civilised society." When Kames pleaded for reason he was in fact pleading for a more historical approach. Kames had learned from Montesquieu to look for the connection between the law and the social and economic circumstances of society. But he recognised the limitations of Montesquieu's own application of this conception.[28] "That celebrated writer abounds with observations no less pleasing than solid. But a sprightly genius, prone to novelty and refinement, has betrayed him into manifold errors." In particular, though he does not expressly say so, Kames recognised the essentially fragmentary character of the Spirit of the Laws. It lacked an organising principle around which its author's acute observations could be marshalled.[29] This lack Kames attempted to supply in the principle of the progress of society—through successive stages from barbarism to civilisation. He visualised the law as the River Nile.[30] " When we enter upon the municipal law of any country in its present state, we resemble a traveller, who crossing the Delta loses his way among the numberless branches of the Egyptian river. But when we begin at the source and follow the current of law, . . . all its relations and dependencies are traced with no greater difficulty than are the many streams into which that magnificent river is divided, before it is lost in the sea."

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[25] p. x.

[26] Cited by Lord Macmillan, *Man of Law's Tale*, 215, where it is attributed anachronously to Lord Pitmilly.

[27] *Historical Law Tracts*, 2nd ed., Edinburgh, 1761, v.

[28] *Elucidations*, xii.

[29] Duncan Forbes, "Scientific Whiggism: Adam Smith and John Millar," *Cambridge Journal*, Vol. 7 (1954), 646 *et seq.*

Although Kames saw this principle he did not apply it with much success himself. Perhaps the reformer in him prevented him. For most of his essays on the history of law were tracts supporting some particular improvement favoured by their author. His underlying purpose was to develop the law more rapidly in accordance with the needs of the times. It seems at first sight paradoxical that a judge, who was among the first to interest himself seriously in the history of the law, should be so anxious to change it. But in fact only one who has a sure grasp of the historical origins of a rule of law, and of the connection of that rule with a particular set of social or economic conditions, can see that the time has come to abandon it when the changed circumstances no longer require it. An historically minded judge, in other words, can see the direction in which the law is moving and this insight gives him a certain freedom in handling his authorities. Kames was such a judge. So also was the late Lord Cooper, and so is Lord Justice Denning in England.

Kames's influence on the thought of his time has perhaps been underestimated because it was exercised not so much through his writing as by personal contact with the coterie of scholars whom he gathered about him. Pre-eminent among these was Adam Smith. When Smith was congratulated on the number on the number of able writers Scotland had produced, he observed, " We must everyone of us acknowledge Kames for our master." [31] Smith's achievement from the point of view of legal thought was to combine the sociology of Montesquieu with the historicism of Kames. The progress of society became for him a principle of historical investigation. In Dugald Stewart's words,[32] " he attempted to account for the changes in the condition of mankind, which take place in the different stages of their progress, for the corresponding alteration which their institutions undergo." Actually Stewart was applying these words to Montesquieu, but as Mr. Duncan Forbes has observed,[33] this is just what Montesquieu does not do. Stewart was reading back into *L'Esprit des Lois* the contribution of Montesquieu's Scottish disciples. John Millar, Professor of Law at Glasgow, who was a pupil of Adam Smith and a member of Kames's circle, put the matter more accurately when he said,[34] " The great Montesquieu pointed out the road. He was the Lord Bacon in this branch of philosophy. Dr. Smith is the Newton."

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[30] *Historical Law Tracts,* ix.

Adam Smith never seems to have made a formal study of law, but it was a subject which deeply interested him [35] and he originally projected " an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society, not only in what concerns justice but in what concerns police revenue and arms, and whatever else is the object of law." [36] He never fulfilled the project as regards justice. However an adumbration of his ideas can be found towards the end of *The Theory of Moral Sentiments*, and in some *Lectures* preserved in student's notes.[37] Also contemporary accounts confirm that Principal Robertson and Adam Ferguson in Edinburgh and John Millar in Glasgow all adopted Smith's ideas on law and government [38] in their writings. Law for him was but one aspect of the historical world of human experience which was waiting to be studied "scientifically," that is without any *a priori* asssumptions dictated by reason. Smith distrusted the reason of fashionable philosophers. For example he says,[39] "That kings are servants of the people to be obeyed, resisted, deposed or punished, as the public conveniency may require, is the doctrine of reason and philosophy; but it is not the doctrine of nature." By nature he meant not a mythical state of nature, but man's conduct in society. Again, since man is a free agent, explanations of human institutions in terms of systems are to be suspected.

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[31] Tytler, *op. cit.*, I. 218.

[32] "Account of the Life and Writings of Adam Smith" in *Essays on Philosophical Subjects by the late Adam Smith* (1795), xliii, cited by Tytler, *op. cit.*, I. 319, and Forbes, *op. cit.*, 646. Stewart does add that " The advances made in this line of enquiry since Montesquieu's time have been great," and refers to Kames' *Historical Law Tracts*.

[33] *Loc. cit.*

[34] *Historical View of English Government*, 4th ed. (1818), Vol. 2, 429–430n. cited by Forbes, *loc. cit.*

[35] See A. Giuliani, *Adamo Smith, filosofo del diritto*, Riv. Int. di Fil. del dir., Vol. XXXI (1954), 505–538, and P. Stein, *Osservazioni intorno ad Adamo Smith filosofo del diritto*, Riv. Int. di fil. del dir., XXXII (1955), 97–100.

[36] *Theory of Moral Sentiments*, VII, 4 *ad fin.* (7th ed., 1792, II, 399).

"The man of system . . . seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon a chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impress upon it. If these two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably." [40]

Although Smith and his followers reacted against the deductive law of reason of their contemporaries, they would not have admitted to rejecting natural law. Their object, says Jeffrey,[41] was "to trace back the history of society to its most simple and universal elements—to resolve almost all that has been ascribed to positive institution into the spontaneous and irresistible development of certain obvious principles.'' They had considered previous attempts to establish systems of the natural rules of justice, independent of positive institution, and they regarded that of Grotius as the best. But they rejected them on two main grounds.[42]

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[37] Ed. by E. Cannan, Oxford, 1896.

[38] W. R. Scott, *Adam Smith as Student and Professor*, 54, 119; Francis Jeffrey. *Edinburgh Review*, IX, 84.

[39] *Moral Sentiments*, I.3.2. (*ed. cit.*, I, 128), cited by Giuliani, *op. cit.*, 509.

[40] *Moral Sentiments*, VI.2.2., (*ed. cit.* II. 110), cited by Giuliani, *op. cit.*, 520.

[41] *Edinburgh Review*, IX, 84.

First, these writers, though proposing to give rules abstracted from any particular system, in fact adhered closely to one, namely the Roman law. Smith and his followers were conversant with the rules of Roman law and respected it, but for them it was no longer "reason in writing.'' Indeed the extreme Millar could even describe it as "in many of its doctrines erroneous, and in some of its principles narrow and illiberal.''[43]

A second and more important criticism of previous writers on jurisprudence was that they did not sufficiently mark the boundary which separates strict law from mere morality. They were concerned with what the good man, the man with the most delicate scruples of conscience, should think himself bound to perform, and their systems are sets of rules for the conduct of such a man. This, says Smith,[44] is casuistry, not jurisprudence. Jurisprudence is concerned not with what the good man should be disposed to do, but with what a judge should compel him to do. Smith thus saw the necessity to distinguish law and morals and adopted as a working distinction the different ways in which each is enforced. A legal obligation is one which the party entitled can exact by force—which a judge will oblige the other party to suffer or perform. In Smith's view the fault of the natural lawyers, from Cicero to Pufendorf and Barbeyrac, was that they tried to do too much—they attempted "to direct by precise rules what it belongs to feeling and sentiment only to judge of'' and what it requires a complete view of their whole circumstances to determine—the so-called laws of chastity and modesty, the rules of veracity, etc. As a result, " books of casuistry are generally as useless as they are commonly tiresome." They did not achieve the desired aim of establishing a system of natural jurisprudence—" a theory of the general principles which ought to run through and be the foundation of the laws of all nations."

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[42] Millar, "The Progress of Science relative to Law and Government" in *Historical View of the English Government*, 4th ed. (1818), Vol. IV, 283 *et seq.*

[43] *Loc. cit.*

[44] *Moral Sentiments*, VII.4.2. (*ed. cit.* II. 365–366, 392, 398).

The legal thought of the school of Kames, Smith, Robertson and Millar—the Scientific Whigs[45]—had two main aspects. First it encouraged what may be called a realist attitude to law. They saw clearly the limitations of the law. " Mere justice," said Smith,[46] " is on most occasions but a negative virtue and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person or estate or reputation of his neighbours, fulfils all the rules of what is peculiarly called justice and does everything which his equals can with propriety force him to do or which they can punish him for not doing." Side by side with this view of the compulsive aspect of law they saw the intrinsic imperfection which is inherent in the generality of legal rules. They stressed, that where many cases are brought within the same general rule the smaller circumstances in which they happen to differ are overlooked; and so decisions according to the general rule may actually produce injustice in some instances.[47]

Concentration on the method of enforcement in delimiting law and morals led Smith and his friends to look at law from the point of view of the judge, and this led them to an awareness of a further aspect of law—its agonistic or competitive character.[48] We often tend to consider the administration of justice in terms of abstract righteousness. We look at a lawsuit as primarily a dispute between right and wrong. But underlying the preoccupation with moral values is the element of winning and losing. The question at issue must be fought out according to the rules of procedure laid down. As Huizinga says,[49] " Justice is made subservient to the rules of the game." One side or other must win. Adam Smith in his moral theory was continually appealing to the judgment of an over-worked impartial spectator. He naturally saw the judge in his rôle as umpire, whose main function was to see that the parties in presenting their claims and defences observed the rules of the game.

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[45] *Cf.* article by Duncan Forbes, *cit. ante*, n. 29.
[46] *Cf.* Millar, *Historical View*, *cit.* Vol. IV, 267.
[47] Millar, *Historical View*, IV, 279.
[48] Giuliani, *op. cit.*, 534 *et seq.*; J. Huizinga, *Homo Ludens*, Eng. tr. 1949, 78–79.

Smith's great friend, the philosopher David Hume, saw this aspect of law very clearly.[50] He observed that in law right and obligation admit of no degrees,—that the law does not recognise half-rights and half-obligations. An object must either be in the possession of one person or another. An action must either be performed or not. Justice may direct a compromise solution to the dispute, but in a lawsuit one side must be chosen to the exclusion of the other. As a result, Hume points out, civil judges who " are obliged to give a decisive sentence on some one side, are often at a loss how to determine, and are necessitated to proceed on the most frivolous reason in the world. Half-rights and obligations, which seem so natural in common life, are perfect absurdities in their tribunal; for which reason they are often obliged to take half-arguments for whole ones, in order to terminate the affair one way or another."

This view of law as in some sense a game was not restricted to Smith and Hume. I do not think it is too fanciful to suggest that this insight may have been behind a remark of Lord Kames's which has been misunderstood.[51] Kames was presiding as judge on circuit at Ayr, when a certain Matthew Hay, with whom his Lordship used to play at chess, was tried for murder. At the conclusion of the trial, the jury brought in a verdict of guilty, and Kames exclaimed " That's checkmate for you, Matthew!" This has frequently been held to be evidence of extreme coarseness and brutality in the man who purported to lay down aesthetic standards in his *Elements of Criticism*. Perhaps it is better considered as a recognition of the element of chance in the legal process, and the finality of the verdict, spoken in a tone of quiet reflection.

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[49] *Op. cit.*, 79.

[50] *Treatise of Human Nature, III.* 2.6.2. *ad fin.* (ed. of 1740, Vol. III, 127); for Hume's views on law see L. Bagolini, *Esperienza Giuridica e Politica nel pensiero di David Hume*, Siena, 1947.

[51] Cockburn, *Memorials of his Time*, 1856, 117 n. *Cf.* H. Laurie, *Scottish Philosophy in its National Development*, 1902, 98; Forbes Gray, *Some Old Scots Judges*, 15.

The other main aspect of the legal thought of the Scientific Whigs was its historical bias. The emphasis was especially on social and economic causes. Robertson, for example, shows [52] how the barbarian invaders of the Roman empire discarded the Roman laws because these laws were repugnant to their own manners and ideas; they were adapted to a state of society with which the invaders were entirely unacquainted. But by the twelfth century, when a manuscript of the Digest was accidentally discovered at Amalfi, the state of society had advanced and ideas had improved, and men were "struck with admiration for a system which their ancestors could not comprehend," and so the study of Roman law began anew. Millar, who was the extremist of the group, allowed practically no effect at all to arbitrary or accidental causes. He poured scorn on the suggestion that the revival of Roman law was due to the discovery of a manuscript. "We may be allowed to entertain some doubt, whether an event of that magnitude could have proceeded from a circumstance so frivolous." [53]

Those who thought of the history of legal institutions in terms of the progress of society were probably less exact in their observations than a pure antiquary such as Stair's Old Etonian great-grandson, Lord Hailes. But the latter's narrative had what Cosmo Innes called [54] "an unnecessary and repulsive dryness" which cannot be found in the writings of the Scientific Whigs. They popularised the idea of looking for the historical origins of a legal rule or institution. People saw historical survivals everywhere. One of the numerous stories of Lord Monboddo, that distinguished alumnus of Marischal College, illustrates this.[55] During a visit to London, Monboddo attended as a spectator a trial in the Court of King's Bench. Suddenly somebody raised the cry that the roof of the court room was giving way, whereupon judges, lawyers, litigants and spectators all made a rush to get out. The only person who kept his seat was Monboddo, who was short-sighted and rather hard of hearing. After it had appeared that the alarm was false, he was asked why he had not bestirred himself to avoid the ruin. He coolly answered that he thought it was an annual ceremony, with which as an alien to English laws he had nothing to do.

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[52] "View of the Progress of Society in Europe" in *History of the Reign of the Emperor Charles V*, 1769, Vol. I, 65–66.

[53] *Historical View*, *cit.* Vol. II, 321.

[54] *Scotch Legal Antiquities* (1872), 8.

Monboddo represents a variation in the trend in legal thought which we have been considering. He was also critical of the law and he too saw law as produced by the circumstances of society, but he did not consider that society was getting progressively better. Unlike Kames and Millar, whose education was confined to Scotland, Monboddo had, on leaving Aberdeen, spent three years at Groningen, where he became an accomplished civilian. His attitude to Roman law, in contrast to the disdain of John Millar, was in the tradition of Alexander Bayne, first Professor of Scots law at Edinburgh. He had observed[56] that "the excellency of the particular laws of any country is generally ascribed to the nearer resemblance they bear to those admirable Laws of Antiquity" (*i.e.*, Roman Law) "wherein right Reason shined forth in its brightest lustre." In this spirit Monboddo condemns the institution of "arrestment to found jurisdiction" as "an invention of later and barbarous ages altogether unknown to the Civil Law."[57]

I have concentrated particularly on the views of the more liberal thinkers on law in eighteenth-century Scotland because they seem to have formed a definite school (they were Presbyterians, Whigs, Hanoverians, Lowlanders) and their views seem to have been especially influential in this formative period of Scots law. But their historical approach to law was shared, though in a rather different form, by others who were not of that school and who held opposing political views, such as Baron Hume, the nephew of the philosopher, and Professor of Scots law at Edinburgh.[58] Kames, it will be remembered, saw law as a great river, ever rolling on and dividing into different courses. Hume had a less fluid but no less vivid image of the law. It is described by Sir Walter Scott, who attended Hume's lectures and copied them out twice in his own hand. Hume, he said,[59] presented " the fabric of the law, formed originally under the strictest influence of feudal principles and innovated, altered and broken in upon by the change of times, of habits and of manners, until it resembles some ancient castle, partly entire, partly ruinous, partly dilapidated, patched and altered during the succession of ages by a thousand additions and combinations, yet still exhibiting, with the marks of its antiquity, symptoms of the skill and wisdom of its founders, and capable of being analysed and made the subject of a methodical plan by an architect who can understand the various styles of the different ages in which it was subjected to alteration. Such an architect has Mr. Hume been to the law of Scotland." [60] This image is more static and perhaps more romantic than that of Kames—it certainly ascribes more weight to the human element in the formation of law—but it shows the same realisation of the basic connection between the law and the circumstances of society.

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[55] John Kay, *Portraits* (1877 ed.), Vol. I, 20, n. 3.

[56] *Discourse on the Rise and Progress of the Law of Scotland*, appended to Hope's *Minor Practicks*, Edinburgh, 1726, 151.

[57] Cited by N. J. D. Kennedy in "The Faculty of Law," *Studies in the History of the University of Aberdeen*, ed. by P. J. Anderson, 1906, 276.

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[58] Hume's political views are evidenced by Cockburn, *Memorials of his Time*, 1856 ed., 74, 92; abridged ed. (by Forbes Gray), 1946, 61, 70. Four Volumes of his *Lectures* have been published by the Stair Society.

[59] Autobiographical Fragment in Lockhart, *Life of Sir Walter Scott*, 2nd ed. (1839), Vol. I, 81–82.

[60] *Cf.* Blackstone, *Commentaries on the Laws of England*, Bk. III, Chap. 17 *ad fin.*, " Our system of remedial law resembles an old Gothic castle erected in the days of chivalry but fitted up for a modern inhabitant. The moated ramparts, the embattled towers and the trophied halls are magnificent and venerable, but useless and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult." (Cited by C. R. Fay, *Adam Smith and the Scotland of his Day*, 1956, 97.)

Finally, I would briefly summarise my conclusions as follows:—In the past, commentators, discussing the formation of Scots law, have been concerned to emphasise the fundamental differences which distinguish Scots law from English law, and have therefore tended to stress the natural law-thinking to be found in Stair and Erskine, and to point out its resemblances to the continental rationalist form of natural law.

I am suggesting that this kind of natural law-thinking was challenged rather earlier in Scotland than on the continent by an anti-rationalist, sociological and flexible conception of law, which can claim equally to be characteristically Scottish. But for the influence of this way of thought, Scots law in the nineteenth century might have taken a different path. It may have prevented the development of anything like the arid jurisprudence of conceptions, from which some continental systems are still suffering. It may be responsible further for the absence in Scotland of any movement for the rigid codification of law. It certainly anticipated more than one of the dominant movements in the continental thought of the nineteenth century.

For these reasons I submit that the exponents of this conception of law merit closer study than they have so far been given by the lawyers of Scotland.

PETER STEIN.

LEGAL STUDIES IN THE SCOTTISH UNIVERSITIES

In a very valuable article in a recent number of this journal [1] a learned contributor has discussed the apparent inadequacy of university education for the legal profession, and particularly the solicitor branch thereof, in Scotland. It is proposed to consider here this topic of the university study of law from the other side and to try to assess how well or ill the Law Faculties in the Scottish universities are performing their function. The question is worth discussing particularly because most of the Scottish universities have recently adopted fresh Ordinances governing the award of their basic degrees in Law, which deserve close and critical examination, discussion and comment. No doubt it is hoped that these new Ordinances will provide the framework for the long-hoped-for revival and will give a distinct stimulus to the study of law. The starting-point of this consideration must then be the examination of these new Ordinances and an assessment of their adequacy.

The past history of legal studies in the Scottish universities has been a sorry one and the periodical literature bearing on the topic is one long series of complaints, laments, regrets and unfavourable comparisons.[2] That may go some way to explain but does not help the present situation, nor does it enlighten the prospects for the immediate future. At least there is agreement that the study of law in the Scottish universities has never stood and does not stand where it should, and this has unfortunately been the conclusion of every critic who has considered the topic in the last eighty years, since the modern system was instituted. This result is particularly disappointing when one considers what heights these universities have attained in other fields of learning and scholarship and also when one bears in mind that Scots law for its survival requires vigorous and flourishing study and scholarly teaching, and since law has been professedly a principal subject of study in these universities from their very foundation. That Scotland has had and still has not merely competent but learned lawyers is undeniable, though it may be doubtful how much credit belongs to the universities for their scholarship. Indeed it is more than likely that if it were not that Scots law is a distinct system not taught elsewhere than in Scotland many students would have gone furth of Scotland for their legal training.

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[1] Brownlie: "The Universities and Scottish Legal Education," 67 J.R. 26.

[2] *Ibid*: See the articles cited in the footnotes.

Historical

While law had been taught to some extent in the Scottish universities for very many years its organisation on recognisable lines is quite a modern development and it is only with this that we need concern ourselves. The first general Ordinance (No. 75) regulating the award of degrees in law and defining the curriculum on which the degree of LL.B. should be granted in all the universities which possessed the necessary equipment was framed by the Commissioners appointed to reform all the Scottish universities under the Act of 1858. This provided for the LL.B. being conferred on graduates in Arts who had gone through a curriculum of three years in law, comprising attendance on courses each of eighty lectures on Civil Law, Scots Law, and Conveyancing, and courses of forty lectures on Public Law, Constitutional Law and History, and Medical Jurisprudence. “ The degree was conceived as an academic distinction rather than as a professional qualification and included subjects not required by Writers and Solicitors or even by Advocates while the previous possession of a degree in Arts excluded the great body of law students from aspiring to its possession. It was only at Edinburgh that all the subjects were taught and in order to secure their being taught there the Commissioners were obliged to revive a dormant chair of Public Law, and to divert the teaching of another chair from Universal Civil History and Antiquities to Constitutional Law and History

. . . For some time progress was rather slow. At Edinburgh only twenty-four candidates, including some few who had begun their course at Glasgow, obtained the degree in ten years from its institution, and it was more than ten years before anyone at all obtained it at Glasgow." [3]

In 1872 the Edinburgh Court intimated the desire for the introduction of a degree in law both easier of attainment and more in demand than the LL.B. This request was granted and Glasgow followed suit, obtaining sanction for a similar but not identical alteration of Ordinance 75 providing for the degree of B.L. If the candidate were not a graduate in Arts he had to pass an examination in Latin, Logic or Mathematics, and Greek or French or German. The B.L. might be obtained at Glasgow on a minimum curriculum of two years, including attendance on Civil Law, Scots Law, Conveyancing, and one of Public Law, Constitutional Law and History, and Medical Jurisprudence. Moral Philosophy or Political Economy might in certain cases be counted instead of Civil Law or the fourth law subject.[4] The B.L. was first awarded at Glasgow in 1874, at Edinburgh in 1875, and at Aberdeen in 1895.[5] St. Andrews for long did not confer degrees in Law.

The Commissioners under the Universities Act of 1889 passed two general Ordinances revising the regulations for the degree of LL.B. (Ordinance 39, General No. 11) and of B.L. (Ordinance 40, General No. 12), although they stated that they had some hesitation in continuing the latter degree. These came into force in 1894. The LL.B. curriculum was raised to eight courses, four of eighty lectures (Civil, Constitutional, Scots or English Law, and one of Conveyancing, Political Economy, or Mercantile Law) and four of forty lectures (General Jurisprudence, Public International Law, and two of International Private Law, Administrative Law, Forensic Medicine and Political Economy). The B.L. regulations suffered little change. The subjects for examination, if the candidate were not a graduate, were altered and the legal subjects were Civil Law, Scots Law, Conveyancing and Forensic Medicine or a half course in one of the other subjects. Both Ordinances provided for the awarding of distinction to meritorious candidates.[6]

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[3] Coutts: *History of the University of Glasgow*, 1451–1909, p. 438. *Cf.* Mackie: *The University of Glasgow*, 1451–1951, p. 274: "Regarded as an academic honour the degree made little appeal to professional lawyers." See also the figures in Brownlie, *loc. cit.*, p. 55. The first Glasgow LL.B. was Galbraith Miller in 1875. He subsequently lectured there in Public Law (later Jurisprudence and Public and Private International Law). For his struggles to have the degree conferred on him, see Coutts, p. 452.

[4] Coutts, *op. cit.*, p. 453.

[5] Galbraith Miller, *Law of Nature and Nations in Scotland*, p. 1.

In 1911 the LL.B. was revised in minor respects and the B.L. replaced by a new Ordinance, effective in 1912, which did away with the previous examination for non-graduates. The 1894 LL.B. Ordinance, as revised, continued the practice of requiring the candidate to be a graduate and required him to pass in at least eight law subjects, spread over three years, passing the subjects at least two at a time. The subjects and the prescribed minimum courses of lectures were: (1) Jurisprudence, General or Comparative, 40 lectures; (2) The Law of Nations or Public International Law, 40 lectures; (3) Civil Law, 80 lectures; (4) Law of Scotland or Law of England, 80 lectures; (5) Constitutional Law and History, 80 lectures; (6) Conveyancing, 80 lectures; or Political Economy, or Mercantile Law, 80 lectures; and (7) two of the following subjects: International Private Law, Political Economy, Administrative Law, and Forensic Medicine, 40 lectures. To the last category were added at various times in various universities, Evidence and Pleading or Procedure, History of Scots Law, and Comparative Law.

The 1911 B.L. required attendance over not less than three academical years on five courses, or if only a shorter course in Civil Law were taken, a sixth 40-lecture course. The five courses were: (1) Civil Law, 80 lectures; (2) Scots Law, 80 lectures; (3) Conveyancing, or Constitutional Law and History, or Mercantile Law, 80 lectures; (4) Jurisprudence, or Forensic Medicine, 40 lectures; (5) Constitutional Law and History, or Mercantile Law, if not taken, or Political Economy, all 80 lectures, or any two of the following: Jurisprudence or Forensic Medicine, if not already taken, Public International Law, International Private Law, Evidence and Procedure. As in the LL.B., subjects had to be passed two at a time, unless in the case of one last subject remaining to complete the degree, and it was expressly provided that the standard of examination in the subjects common to the LL.B. and the B.L. should be the same. In both degrees, the degree might be awarded with Distinction to candidates who displayed exceptional merit in their examinations.

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[6] Coutts, *op. cit.*, p. 470.

The 1954 Ordinances

As time has gone on these Ordinances were increasingly felt to be unsatisfactory and for years discussions proceeded with a view to their replacement by revised Ordinances. In the event, however, it was not found possible on this occasion to secure complete unanimity so as to permit of the adoption of new Ordinances common to all four Scottish universities, as has been the usual practice in the past, and in the result a new LL.B. Ordinance has been adopted common to Glasgow, Aberdeen and Edinburgh, St. Andrews adhering to the 1894 Ordinance for the time being, while Glasgow and Edinburgh have adopted new B.L. Ordinances in similar but not identical terms.

To consider now these new Ordinances in greater detail: the new LL.B., following the older practice, provides first (sec. I) that every candidate must before commencing his studies in law either be a graduate in Arts of a Scottish university or have obtained at some other university a degree in Arts specially recognised for this purpose by the University Court on the recommendation of the Senatus Academicus of the university in which the candidate intends to graduate. This provision is traditional but it will be contended hereafter that it is a relic of older times which have passed away, and has evil consequences on the law course, so that its retention at the present time is hard to defend, if indeed it is not wholly indefensible. But of this, more later.

It is then provided (sec. II (1)) that a candidate must in the course of not less than three academical years after becoming a graduate in Arts attend courses in not less than eight of the prescribed subjects, with a proviso that if a candidate has passed in at least two of the said classes in the Faculty of Arts on the LL.B. standard the period of study may be reduced to two years, during which he must attend the rest (not less than five subjects) of the law degree course. The Ordinance therefore envisages the Arts and Law degrees overlapping to the extent of not more than three classes, so that the combined degrees might be taken on a minimum of twelve courses over five years. At St. Andrews Civil Law and Constitutional Law and History are common to the Faculties of Arts and Law; at Glasgow Civil Law and Political Economy are common; at Aberdeen Civil Law, Jurisprudence, Constitutional Law and the General Course on Scots Law may all be taken in the Faculty of Arts (though the student must still take five more classes in Law), and at Edinburgh Civil Law, Constitutional Law and History, and Public Law (which comprises Jurisprudence and Public International Law) are common.

The Ordinance then lists (sec. II (2)) the subjects for examination, and gives each university Senate power, subject to the approval of its own university court, to make additions or modifications to the list. The list is: (1) Civil Law; (2) Jurisprudence; (3) Constitutional Law or Constitutional Law and History; (4) Scots Law; (5) Conveyancing; (6) Mercantile Law; (7) Public International Law; (8) International Private Law; (9) Evidence and Pleading or Evidence and Procedure; (10) Forensic Medicine or Forensic Medicine and Penology; (11) Administrative Law; (12) Accountancy or Accounting and Business Methods; (13) Comparative Law; (14) History of Scots Law. A proviso that no curriculum shall include a subject in which a qualifying course has not been established covers the fact that St. Andrews has no courses in Mercantile Law, Administrative Law, Comparative Law or History of Scots Law, Glasgow has no course in Comparative Law, and Edinburgh has no courses in Comparative Law or in History of Scots Law. Aberdeen offers a course in Scottish Legal System which covers much of the ground of a course in History of Scots Law and no separate course in History of Scots Law is at present offered.

Under sec. II (3) of the Ordinance it is provided that every curriculum must include items (1) to (4) and either (5) or (6) as compulsory subjects: the remainder are options. This part of the Ordinance differs quite materially from its predecessor in language and style although the effective differences are quite small. In the first place there is no longer any specification of the length of a course, so that the old distinction between " full " courses of eighty lectures and " half " courses of forty lectures has vanished. It is now a matter for the individual teacher, subject to the directions of his own Faculty and Senate and to the exigencies of time and the arrangement of classes in his university, to determine how many lectures shall be given (or indeed what form of course, lectures, tutorials, or seminar discussion-groups he is going to conduct). This by itself would be a small but distinct improvement in freeing the teacher from artificial constraint if it were not largely nullified by circumstances wholly outside the Ordinance but integral to the present system, which will be discussed later.

As compared with the former Ordinance, Political Economy has disappeared from the list of optional subjects (though Glasgow has subsequently added it); Public International Law (no longer described as the Law of Nations) has been reduced to the level of an option; English Law as an alternative to Scots Law (it was not a proper optional subject, but only an alternative to Scots Law) has disappeared. These changes will probably meet with general approval. It was quite ridiculous to allow English Law to be a possible alternative to Scots Law as a principal subject in a law course in a Scottish university, particularly since under the old Ordinance it would have had to be taken with Scottish Conveyancing and Scottish Evidence and Procedure![7] It is manifest that there has been no demand for it for years, and in fact none of the Scottish universities has offered a course in it for some time. Equally it could never be justified as the main legal subject. A man who wants to learn English Law should go to England.[8] There is, however, a case for offering it as a possible optional subject. The common law of England is the first and main representative of one of the two great legal families in the world, the Common Law family, now represented by England, most of the U.S.A., and most of the British Commonwealth and colonies. As a subject of comparative law it is of interest; students thinking of practice abroad or of the Colonial Legal Service might well be interested; not least, English Law is the most potent and pervading influence on the modern law of Scotland and some knowledge of it would assist the Scots lawyer to understand the importation and not to accept too uncritically or ignorantly what the House of Lords says. It is not envisaged that there ever should be full study and teaching of English Law in Scotland (and in any event to do this satisfactorily would require not one but several courses) but it is worth while considering the possibility of offering as an option a short course of a fairly general and elementary character on English common law, particularly contract and tort, if only to understand the salient features of that system and to avoid too uncritical acceptance or wholly ridiculous misunderstanding of what our brethren south of the Border say and do. English lawyers are scandalously ignorant of Scots Law but that is no reason why the converse should apply. It is true that in a course on comparative law the student will necessarily meet with disconnected snippets of English Law. But there is still in the writer's view a case for an optional short course on the English legal system and the main heads of the common law, particularly contract and tort. Such a course would be far more integrated and useful than the disjointed fragments which a student may pick up in a course on comparative law. Similarly comparative law, while its introduction as an optional subject is thoroughly desirable, is no substitute for it, still less for the careful study of Roman Law.

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[7] *Cf.* Gibb: "Reform in the Scottish Law School" (1943) 55 J.R. 152, 161.

[8] *Cf.* Normand Committee Report (1943), p. 2.

To return, however, to the Ordinance. Section III provides that a student must spend two years (formerly one) in the university in which he intends to graduate and may spend one year (formerly two) at one or more other universities, whose courses and examinations in any subject may in certain circumstances be accepted as exempting from further study and examination in that subject.

Section IV provides that every candidate is to be examined both orally and in writing but (and this is new) that the examiners may at their discretion pass or fail any candidate without an oral examination. The last phrase is salutary and will avoid wasting examiners' time on candidates who have submitted very good or very bad papers.

Then it is provided (sec. IV (2)) that Distinction may be awarded to candidates who have displayed exceptional merit in their examinations for the degree and, if the Board of Examiners in the University so decide, Commendation may be awarded to those who have displayed merit in their examinations. It will be observed that not only has the giving of Distinction been taken over from the old Ordinances but the possible awarding of Commendation has been introduced. No provision has been made for the conduct of Honours courses nor for the possibility of taking the degree with Honours. The rewarding of merit by the giving of a degree with Distinction or Commendation is not to any extent a satisfactory substitute for Honours. General academic practice recognises not only Ordinary or Pass degrees, but also Honours degrees of various grades as signifying a distinctly superior level of attainment, while a degree from any reputable university in any subject or group with First Class Honours is accepted without question as denoting a very high level of scholarship. It does not matter that the attainment of Distinction may in fact demand as high a level of examination performance as would First Class Honours. It does not, and never will, nor can it, have the same academic standing nor carry anything like the same weight as a degree with Honours. It is very unfortunate that the opportunity was not taken to scrap this thoroughly unsatisfactory method of rewarding good performance. It should be noted that the existence of distinct Honours courses, and a substantially different curriculum from that for the Ordinary degree, such as exist in the Faculties of Arts in Scotland, are *not* essential conditions for the award of an Honours degree. In London, for instance, the LL.B. is awarded both as a Pass degree and with Honours to candidates taking the same syllabus and the same examinations; the difference is solely one of performance in the examinations. " Another special characteristic of the curriculum for the London LL.B. degree is that it is a curriculum prescribed for all candidates for the LL.B. irrespective of their abilities. There is no division of any kind between Honours and Pass candidates, and a survey of examination papers and examination results in the LL.B. examinations over the past fifteen years will show that, in general conception, the examination is an Honours examination. A graduate with a Pass degree is, in fact, a candidate who has failed to attain the standard of Honours in an Honours examination. His performance may, in reality, be one of some merit, for only first and second class Honours are awarded, although the second class is divided into an Upper and a Lower Division."[9] Again in Glasgow the final examinations for the degree of B.Sc. in Engineering are conducted on an Honours standard but candidates who fail to attain the level required for at least Second Class Honours may be awarded the Ordinary Degree.[10] Distinct courses are therefore not an academical essential for the award of Honours. It appears that a great opportunity has here been thrown away. The main reason is probably the excessive preoccupation with vocational requirements, the exigencies of professional training in fact dictating and limiting the academic study of law.

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[9] Keeton: " Revision of Courses for the LL.B. in London " (1948) 1 J.S.P.T.L. (N.S.) 189.

[10] G.U. Calendar, 1956–57, p. 459.

Section V of the Ordinance is interesting. It provides (1) that the Senatus of each university may with the approval of its own University Court make regulations (i) as to the grouping of subjects which may be taken for the degree, and (ii) as to the examinations which candidates must pass in each subject and course. Section V (2) provides that each Senate may with the approval of its own University Court make regulations: (i) as to the order in which subjects and courses may be taken; (ii) as to the nature and extent of the course in any subject and the number of lectures and other classes which shall be included in it; (iii) as to the standard of the examinations which candidates must pass in each subject and course and the standard necessary to obtain distinction and commendation; and (iv) imposing conditions regarding the number of subjects in which candidates must pass at one examination and the subjects in which candidates must pass before presenting themselves for examination in other subjects.

These delegated powers are very important. In the first place it puts in the hands of each individual university considerable power to vary and modify the detailed operation of the Ordinance so that it is quite possible that a different exercise of the delegated powers in different universities will result in degree courses which do in fact differ quite materially from one university to another. In view of this it is possibly questionable whether it was worth so much trouble to have the Ordinance nominally the same for three universities when it may work out quite differently in practice in all three. Already distinct variations in practice are apparent. Equally important is the disappearance of the former peremptory requirement that a student must pass in at least two subjects at one diet of examination. That was an awkward and artificial and distinctly unpopular rule and as such it has rightly disappeared (though under the delegated power any university could reintroduce it); but its disappearance would permit a candidate to crawl to the degree by taking his eight classes at eight (or more) examinations. This by itself opens the door rather wide to the distinctly less diligent and intelligent students. True it is that that is allowed for an Ordinary M.A., and equally truly the majority of candidates can and do take their subjects more than one at a time; but outside Scotland it is common to require a law student to profess four or even more subjects simultaneously for examination purposes and it is questionable whether some similar rule should not be demanded here too. This point is, however, connected with the next matter.

It is similarly noteworthy that no attempt is made in the Ordinance to prescribe an order of study, though that can be done by regulations. It is to be hoped that this will in fact be done in each university so as to control the chaos permissible under the Ordinance whereby a student might, apart possibly from the advice of the Adviser of Studies, take his course in the most absurdly unsuitable order. It must reasonably be supposed that the Faculties of Law know better than do students which subjects should be taken early and which late, so that there is much to be said for a defined curriculum. Of course some latitude would be permissible in respect of the optional subjects but there seems no good reason why there should not be a strictly defined order of study in respect of the essentials. If that were so, should there not be a prescribed series of examination hurdles to be taken in order, instead of a disconnected series of jumps? Moreover, such expedients would tend to simplify the arrangement of classes. It may be that the matter is already sufficiently controlled by the existence of the Advisers of Studies but it is still open to a student, so far as the Ordinance goes, to begin with Conveyancing and International Private Law! It is accordingly to be hoped that the delegated power of making regulations will be freely exercised and exercised judiciously so as to fill the gaps left by the Ordinance.

Such then are the material provisions of the new LL.B.

Ordinance. It is certainly an improvement on the wretched old Ordinance but nevertheless the general impression which remains is most profoundly disappointing. The verbal drafting and formulation have been much improved, archaic phrases eliminated, and some old anomalies and stumbling blocks removed ; but in all substantials it is just the mixture as before. In 1943 Professor Gibb [11] wrote that " the need for reform—for a radical overhaul—is imperative . . . Can the universities not offer them [*i.e.*, students returning from the Forces to take up the study of law] something better than the ill-planned patchwork of legal education which has had to serve for so many years?" and he outlined a proposed scheme of reform. It does not appear that any of his recommendations has been adopted. The overhaul has been made and the result is very little different from the old régime. It has not been nearly sufficiently drastic to effect any material change or improvement in Scottish legal education, because the new Ordinance and the system within which it operates are still founded on the same erroneous premisses as the superseded Ordinance.

What then of the B.L. Ordinances? As has been mentioned, no complete agreement could be reached among the four universities on a new B.L. Ordinance and all four universities will henceforth operate under distinct Ordinances.

St. Andrews: The 1911 B.L. Ordinance is still in force but it is understood that alterations to these regulations are at present under consideration, on lines generally similar to those of the Glasgow and Edinburgh Ordinances discussed below, though as yet no new Ordinance has been adopted.[12]

Glasgow: The new B.L. Ordinance came into force in October 1954 ; it provides for a course extending over not less than *four* years, comprising two Arts classes and six Law classes. The subjects to be studied in the first year are to be any two of : (a) English ; (b) History or Scottish History or Constitutional History ; (c) Logic or Philosophy or Moral

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[11] Gibb, *loc. cit.* at p. 153.

[12] *Cf.* Law Society of Scotland Newsletter, 1954 S.L.T. (News) 215.

Philosophy; (d) Latin; (e) Political Economy or Political Science. The legal subjects, to be studied in the second, third and fourth years of the course, are: (i) Constitutional Law or Constitutional Law and Legal History; (ii) Civil Law; (iii) Jurisprudence; (iv) Scots Law; (v) Conveyancing or Mercantile Law, and (vi) any one of the eight remaining classes in the Faculty. The other provisions of the Ordinance, including the delegated powers of making regulations, are the same as in the LL.B. Ordinance. It is not expressly provided but seems to be implied that students should spend the first year as full-time students and not commence any apprenticeship until the second year (*i.e.*, the first year of legal study). This is the general understanding of the matter and as students suffer no prejudice in respect of length of apprenticeship thereby, they are being advised to do so.[13] A possible drafting error in the Ordinance is that it seems not to be permitted to take both Conveyancing and Mercantile Law; this may have been intended, or it may be a *casus omissus.*

Aberdeen: As with St. Andrews alterations of a similar general character are in contemplation but no new Ordinance has yet been adopted and the 1911 Ordinance is still in force.[14]

Edinburgh: The new B.L. curriculum, which came into force in October 1954, extends over not less than *three* years but the number of classes to be taken in the first year is such that it is not possible for a student to serve an apprenticeship concurrently with these classes. He therefore has still to do four years from the start of his course until his apprenticeship will run out, but in the last year he will be entirely free from classes.[15] The Ordinance provides that in the first year the student is to attend two classes selected from the list: (a) English literature; (b) History (British History) or Scottish History or European History; (c) Logic and Metaphysics or Moral Philosophy; (e) Political Economy, and he must also take Civil Law. In the second and third years he must attend five more law classes, the same as are specified under the Glasgow Ordinance, with the exception of the optional subjects of History of Scots Law and Comparative Law, in which there are no courses. The other provisions are in similar terms to the Glasgow Ordinance. Regulations, however, provide that the Edinburgh B.L. student is to take only a one-term course in Jurisprudence, and not the full two-term course taken by LL.B. students; and in Civil Law he is required to profess a rather lesser prescription of work, omitting the select title of the Digest which LL.B. candidates are required to profess.

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[13] *Cf.* Law Society of Scotland Newsletter, 1954 S.L.T. (News) 173.

[14] *Ut supra*, note 12.

[15] *Ut supra*, note 13.

It is apparent that these new B.L. Ordinances, while differing in detail, follow a common general pattern. The changes they make are rather more substantial than those made in the LL.B., and as compared with it, the new B.L. Ordinances represent a greater advance over the old and, for the first time, the B.L. course looks like a proper degree course. It is apparent that there is a measure of agreement that B.L. students should spend one academic year as full-time students and the Law Society of Scotland has accepted this and recommended that in future the first academic year cannot be reckoned as part of an apprenticeship.[12] This is a distinct though very modest step in the right direction. So, too, the insistence that a B.L. course must include two subjects from the Faculty of Arts, chosen for their cultural value and also for their utility as a background to legal studies, is a small but welcome recognition that there is an intimate connection between Arts and Law, between legal science and the other social sciences. Moreover, and this is quite interesting, this requirement of passing in a few Arts subjects partly revives and partly goes beyond the provisions of some older B.L. Ordinances. As between the two Ordinances so far brought into force, it is not very apparent if Edinburgh gains over Glasgow in keeping the degree course within three years since the student will not be able to complete his apprenticeship until the end of the fourth year (since the first academic year does not count towards it). It may well be that his attendance on the office will be more beneficial to him in the fourth year by reason of his not having any classes (unless, possibly, some extra post-graduate classes) to attend and being enabled to devote his full time and attention to his office training; but that is not a matter which will benefit him *qua* student, and it is not a matter which a university should have in mind at all. The only clear gain over Glasgow is in the rare case of a student who is not also an apprentice, who could graduate in three years in Edinburgh but would require four years in Glasgow. On the other hand Edinburgh requires less in Civil Law and Jurisprudence from its B.L. students than from LL.B. students; in Glasgow they take the same courses as LL.B. students in these subjects.

These then are the salient features of the new Ordinances and no doubt it has been hoped that the universities will happily teach and award degrees under them for some time to come, indeed for a good many years if past experience of the longevity of Ordinances in Law is any guide. Whether that will be so remains to be seen, but it is the writer's considered view that if that is allowed to happen the academic study of the law will be as dead then as it is now and Scots Law may well be dead and extinct too for lack of adequate scholarly exposition and thorough study. The really crucial question now is: Can the Scottish universities, operating under these Ordinances, turn out graduates with an understanding of the place and scope and function of legal science in modern society and a satisfactory grasp of legal principles, from which they can proceed to a more thorough knowledge of particular topics, to satisfactory practical application of the law, to critical discussion of its defects and their cure, and to extending the field of existing knowledge of law? The writer's answer is quite unequivocally in the negative. The new Ordinances are improved in drafting and terminology, there are individual detailed improvements, and in particular the B.L. has been made considerably more satisfactory; but the new Ordinances are not improved or changed in fundamentals or really substantial matters, while, and this is the really radical defect, there has been no change or improvement at all in the concurrent circumstances affecting legal study in the Scottish universities, which affect and govern it quite as much as do the Ordinances if not more. The Ordinances are framed on the hypothesis of these conditions continuing as at present; by themselves they are not by any means the whole story of legal education. One must look, to get the full picture, at the essential concomitants of the Ordinances, the rest of the system, the organisation of the classes, without which the Ordinances are the merest skeleton and which the Ordinances, old and new, tacitly assume. Legal study cannot be considered apart from this system.

The existing system

The present system, of which the University Ordinances are but parts, is conditioned by four salient factors: firstly, the fact that neither branch of the legal profession in Scotland has established any kind of law school or made any arrangements for the instruction of its own entrants, so that the only places where reasonably systematic and comprehensive legal training can be had are in the Law Faculties of the universities, a state which is recognised by the fact that every intending solicitor, whether or not he becomes a graduating student, must attend certain classes in the university. Secondly, there is the fact that the majority of the students in the faculties of law are in fact aiming at the practice of one branch or the other of the legal profession, rather than aiming at the possession of a law degree as a branch of general culture, or with a view to careers other than in legal practice. The great majority intend to become solicitors and consequently have at some time in their training to fit in the period of three years' service in an office, apprenticed to a practising solicitor, required by the Law Society of Scotland (and not required but in fact quite commonly undertaken by entrants to the Faculty of Advocates). Thirdly, there is the fact that it is traditional for the universities so to arrange classes in the Law Faculties as to permit students to attend concurrently in their offices, so as to enable them to complete both their degree courses and their apprenticeship within the minimum period and by about the same time. Thus classes are commonly held in the morning and evening (or at Aberdeen all before lunch) to suit the convenience of students who are also apprentices. Fourthly, in all the universities a considerable number of members of the Law Faculty, including several holders of professorial chairs, are concurrently engaged in legal practice and are only part-time teachers. There has in effect grown up a system in which the requirements of the Law Society of Scotland for a professional qualification largely control the study of law in the universities and while the Law Society repudiates any intention to control the universities, its influence has in the past been consistently brought to bear in favour of Ordinances, a syllabus, and a time-table which are appropriate and convenient to the part-time apprentice. Law study has been conceived almost entirely as vocational training and not sufficiently as academic discipline.[15a] This is not unnatural in view of the way the system grew up but it will not do any longer. The results it has produced have certainly been poor enough; the present generation bear witness to that. Between its part-time students, part-time staff and non-graduating students the Law Faculty has been in most respects more like a tutorial college than a university faculty.

It is not by any means putting it too high to say that the Scottish law student at present is not in any proper sense of the word a university student.[16] He is a solicitor's apprentice who attends classes held in the university (and sometimes not even there) conducted by teachers who have some connection with the university. These objections are not trivial: they are substantial. It is part of a university education to pursue knowledge at the proper place, the seat of learning, and also to devote oneself to it wholeheartedly for three or four years, without other conflicting occupations, certainly during term-time. An LL.B. student has had some experience of university life as an Arts student, a B.L. student is never really any more a university student in the true sense than is a layman who comes to W.E.A. lectures, some of which happen to be given in the university premises. One of the first necessities therefore is to make law students university students in the fullest sense, as much as Arts or Science or Medicine, by making them spend the major part of their time in and around the university lecture-rooms, libraries and reading-rooms for at least most of their course.

[15a] *Cf.* Smith (1955) 3 J.S.P.T.L. (N.S.) 83.

[16] *Cf.* Normand Committee Report, pp. 4–5.

The existence of an apprenticeship as a requisite to obtain a professional qualification coupled with entire reliance on the universities for providing instruction, the system of concurrent study and training, and the underlying assumption that the students are preparing themselves for legal practice, usually as solicitors—a belief fostered by the presence among the staff of the law faculties of a preponderance of practitioner-teachers who have sometimes been unable to see legal education except in terms of training young solicitors—results in the broad pattern of Law Society's schools, not of universities at all. In fact not all students are intending to become solicitors nor are they all indentured. Furthermore the professional bias of some practitioner members of the teaching body consciously or unconsciously moves them to treat every question in the way it would affect students *qua* apprentices (not *qua* students) and even to consider their masters' interests (though what that has to do with the universities is not evident). The same is the source of proposals that some or even all classes should be given in the evenings and on Saturday mornings, the continuing practice in Glasgow of having many of the lectures given in various premises in the centre of the city, and the opposition to the lengthening of courses or the introduction of new subjects which might interfere with practical training. There is this fundamental opposition between the claims of academic study and the demands of professional training and it is this fact which is wrecking Scottish legal studies and completely blocking progress. That is why a new *modus vivendi* is absolutely essential, to find a better balance between the two kinds of training. The present system is radically bad and no remedial measures are of any use: only a complete scrapping of the existing system and its replacement by a wholly new and more satisfactory system can effect the regeneration of Scottish legal studies so much desired, and the elevation of legal studies to a parity with other disciplines in the university, and of Scottish legal studies to a parity with those in the best universities of the western world. A former vice-chairman of the U. G. C. expressed the view in conversation with the present writer that legal studies in Scotland were far behind those in other Faculties and far below the levels prevailing in England. That is a measure of how far we have sunk.[16a]

So long as the antiquated organisation exists, so long will the poverty of results persist too, for new Ordinances by themselves can go no way at all towards bringing about the transformation but merely perpetuate conditions which stifle and prevent improvement. The changes recently made are solely verbal and not at all organisational.

Changes in detail can be made: the introduction of more tutorials, improved methods of examinations, cyclostyled lecture notes and so on, but these could all equally have been made under the old Ordinances. The root evil is subservience of academic training to professional requirements.

What is needed accordingly is to reconsider the organisation of legal studies in the Scottish universities from the beginning. This involves consideration of the proper purpose and function of a university Faculty of Law, the basic degree (or degrees) to be conferred, the subjects to be studied for that degree, the relationship between the claims of theoretical and practical training, and the distribution of time between each. Subsidiary and consequential matters are the methods of instruction, the recruitment of staff, and more advanced degrees. But the essential thing is to set the basic degrees on a proper footing. The matter is urgent because the existing organisation satisfies neither the academic lawyers nor the practitioners and representative voices on each side have been heard to complain of the amount of time and attention the other interest is claiming. It is not a new discovery that no man can serve two masters.

[16a] *Cf.* Gower, "Legal Training in the U.S.A." (1956) 3 J.S.P.T.L. (N.S.) 153, 155· where he expresses the opinion that the function of the university law schools to produce graduates with legal minds is "being better performed by the American law schools than by the English, *or, perhaps a fortiori, the Scottish.*" So too Hamson, "The Teaching of Law," (1952) 2 J.S.P.T.L. (N.S.) 19, 26–27: "In France and on the Continent generally the academic study of the law is recognised as a pre-eminently liberal education . . . the study of the law is as much an introduction to modern society as to a particular profession. . . . It would certainly be disastrous to introduce into England the Scottish system, according to which the academic schools become mere appendages of the professions managed (except at Aberdeen) mostly if not exclusively by persons claiming primarily to be practitioners; for under that system any academic study of the law, as we understand it, simply perishes."

David M. Walker.

(*To be continued.*)

THE AUCTION SALE IN ROMAN LAW

THAT the auction was an important feature of Roman commercial practice is generally accepted.[1] And it is understandable that this should have been so. For, though he might lack the modern means of securing his best advantage, the Roman certainly shared the eternal desire of the person with something to sell to get the highest price for his wares; and the auction was clearly the means most likely to achieve this end. *Auctio* as a generic term in fact covers also *sectio* and *venditio bonorum* which were essentially activities of public law (sale of confiscated property and bankruptcy to satisfy a judgment) as well as the ordinary auction of private law[2]; but it is the last only with which this article is concerned. Legal sources of information on the topic, in the sense of juristic texts, are admittedly not numerous[3]; but there are also, fortunately, the Pompeian tablets[4] and numerous non-legal references and allusions to supplement them and minimise the dangers of conjecture. For all the undoubted importance of this commercial institution in ancient Rome, however, the literature is not large.[5] In particular, so far as the present writer is aware, there is no discussion in English,[6] a fact which, it is hoped, justifies the following pages.

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[1] See, *e.g.*, Mommsen, Ges.Schrift. III.225; Karlowa, RRG.II(1) 629; Talamanca, Contributi allo Studio delle Vendite all'Asta nel Mondo Classico, 105; Schönbauer, 45 Z.S.S. 352, 371.

[2] For *bonorum venditio* and *sectio*, *cf.* Talamanca, *op. cit.*, 153 *et seq.*; Roby, *Roman Private Law II*, 432 *et seq.* and 435, n. 2.

[3] A convenient collection is made in the apparatus to G.IV.126a (Seckel-Kuebler ed.), to which add Ulp.Reg.22.26.

[4] C.I.L. IV,3340 (=IV Suppl.Bd. 1): selections of the more important appear in FIRA 3 (Negotia), ed. Arangio-Ruiz, 400 *et seq.* (that here used); Bruns, *Fontes*, 7th ed., 354 *et seq.*; Girard, *Textes*, 6th ed., 865a *et seq.*

[5] To the present writer, however, there were not accessible, Kniep's *Argentaria Stipulatio* (Festgabe Thon 32 *et seq.*) and *Societas Publicanorum* or Sieg, Quellenkritische Studien zum Bessergebotsklausel im römischem Kaufrecht.

[6] On the other hand, Pringsheim, *The Greek Sale by Auction* (Scritti Ferrini IV (1949) 284 *et seq.*) serves the Greek auction most handsomely.

Of the general course of the Roman auction in its developed form we get a fair picture mainly from the literary sources. Intimation of the intended auction was given both by public announcement by a *praeco* (herald) and by written *proscriptio* (notice).[7] The sale would be held in an *atrium auctionarium*[8]—where quite possibly the lots or samples thereof were previously available for inspection—under the auspices and control of an *argentarius* (banker), styled in this connection *argentarius coactor*,[9] who was responsible for the arrangements and conditions of sale, *e.g.*, whether credit would be allowed to the buyer, whether goods might be delivered before payment, etc.[10] The conditions of sale were doubtless indicated in the *proscriptio*[11] and also intimated at the sale itself. In the actual sale, the *praeco* was again prominent: it was he who put up the lots for sale, intimating the reserve price, if any, stimulated and acknowledged bids and eventually knocked down the lot to the successful bidder.[12] Bidding might, seemingly, be indicated in the various manners still known to the frequenter of the auction room, a wink, or nod, or suchlike sufficing. The actual sale was effected through *addictio*,[13] undoubtedly on the model of *in diem addictio*, the *praeco* indicating acceptance of the present bid unless a better bid is presently forthcoming, a factor to be returned to in discussing the revocability of bids.[14] The sale was recorded in the *argentarius*' records[14a] and the *emptor* became liable to the banker for payment, promising by stipulation to give him the sum: the manner, time, etc., of payment would of course be determined in the conditions of sale. The *argentarius* it was that paid off the person on whose behalf the property was sold, the *dominus negotii*,[15] and he received a commission which seems to have been on a regular scale of 1–2 per cent. of the price, dependent on the amount raised for the lot.[16] Since, of course, the buyer was to pay to the *argentarius* and, by the conditions of sale, might well get credit, the *argentarius* might well settle up with the *dominus* before himself receiving payment from the *emptor*.[17] Accordingly, what really happened was that the *argentarius* paid to the *dominus* the amount of the bid accepted by the *praeco* less the relevant percentage.[18] One assumes that bids would have been made and accepted with the point in mind, on all sides, that the banker's remuneration was to come out of them. There was also, certainly from the early empire, a tax on auctions,[19] also based upon the percentage of the price. Again, however, it is possible that the levy was not made directly upon the party responsible to pay (qu. the *dominus*)[20] but was raised by the State from the *argentarius*,[21] who would naturally have covered himself in respect thereof.

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[7] *e.g.*, Cicero, de Off.III, 55; ad Q.fr. II.6, etc.

[8] *Cf.* Cicero, de leg.Agr.I.3.7; pro Quinct.3.12.

[9] *Cf.* D.40.7.40.8; C.I.L. VI,1923; Cicero pro Cluent. 64, 180; Horace, Sat. I.6.86; Suet.Horace 4, etc.

[10] *e.g.*, G.IV.126a; Plautus, Menaechmi 1159 (*praesenti pecunia*); and see Mommsen, *op. cit.*, 228.

[11] *Cf.* Cicero ad Q.fr.II.6. Hence perhaps the conjunction of *praeconium* and *proscriptio*: one would scarce conceive of the *praeco* crying the full conditions of sale.

[12] *e.g.*, Cicero, N.D.3.34; Verr.III.77; Horace, Ars Po. 419.

[13] *e.g.*, D.41.4.2.8; on *Addicere*, see Lévy-Bruhl, *Nouvelles Études*, 141 *et seq.*

[14] See pp. 64–66 below.

[14a] *Cf.* D.46.3.88: Quintilian, Inst.Or., XI,2,24.

There were thus four parties actually involved in a Roman auction—the *dominus* or person on whose behalf the property was sold: the *argentarius* who organised, regulated and financed the sale: the *praeco* who advertised the sale and conducted the bidding: and the *emptor* whose bid was successful. Our principal concern is with the legal positions of and relations between these various parties.

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[15] Who was, of course, not necessarily *dominus rei*: *cf*. D.46.3.88, Mommsen, *op. cit*., 228, and the general admissibility of sale by a non-owner.

[16] *Cf*. Cato, de re rust., c. 146; Cicero, Pro Rab.Post. 11,30; Mommsen, *op. cit*., 231: as to *Lex Metalli Vipascensis*, c.I., see pp. 50–51, below and n. 45.

[17] *Cf*. D.40.7.40.8: Mommsen, *op. cit*., 229–231; Platon, 33 N.R.H. 137: again, the time periods indicated in the Pompeian tablets would have been too short to be of use as an extension of credit to the buyer.

[18] In the Pompeian tablets, the *dominus* regularly receives payment, *mercede minus* from the *coactor*.

[19] See Tacitus, Ann. I,78; II,42; XIII,31.

[20] *Cf*. *Lex Metalli Vipascensis*, c.I which probably relates to the tax exigible; but see also p. 51 below and n. 45.

[21] There is no authority, but this seems a likely course. The banker had to keep proper books and accounts (D.2.13.10.1): it would be simpler for the State to collect from one source (and that a source with regular accounts) than from the parties in each individual sale. *Cf*. also Mommsen, *op. cit*., 232.

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I

The first problem to answer is, between whom is the sale actually concluded? For the interrelation of *dominus*, *argentarius* and *emptor* inevitably depends thereon. Now there can be no doubt of the *argentarius*' general domination of the auction—it is he who organised the sale, settled the conditions of sale, received payment from the buyer and was himself responsible for paying off the *dominus*. One can thus well understand references to *venditio per argentarium*.[22] But that does not mean that, automatically, one must assume that the *argentarius* was vendor at the sale: references to sales *per praeconem* (and there are some)[23] and the fact that the *praeco* was he who took bids at the sale have never led to the suggestion that the *praeco* was vendor to the *emptor*. Still, Mommsen long ago maintained that the *argentarius* was vendor in the sale[24]: *dominus* and *emptor* were in no direct relationship but each was in relations with the *argentarius*; and Mommsen has distinguished support.[25] The present writer, nevertheless, would support the opinion of those[26] who hold that the sale as such was contracted between the *dominus* and the *emptor*, the only legal bond between the *emptor* and the *argentarius* being the former's promise to the latter of the price after the sale has been concluded.

In the first place, it must certainly be conceded that nowhere do our texts suggest a direct action by either *dominus* or *emptor* against the other and, indeed, are concerned, if at all, with actions and defences available between

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[22] *Cf.* D.5.3.18pr.; 46.3.88.

[23] *e.g.*, Cicero, N.D.3.34.

[24] *Op. cit.*, 228—Der leitende Gedanke dabei ist der, dass statt des eigentlichen Geschäftsherrn der Mittelsmann als Verkaufer auftritt.

[25] *Cf.* Pernice, Labeo II.1, 216; Mitteis, RPR 179, n. 49; Rabel, Grundzüge (2nd ed.) 184; Platon, *op. cit.*: Beseler, 46 Z.S.S. 267.

[26] Karlowa, *op. cit.*: Schönbauer, *op. cit.*; Talamanca, *op. cit.*: *semble*, also Lévy-Bruhl, *op. cit.*, 155.

argentarius and *dominus* or *emptor*[27]: but it is equally to be noted that there is also nowhere an indication of a relationship of the *argentarius* with either (and so, particularly, for present purposes, with the buyer) other than by stipulation.[28] Nothing conclusive is to be found here therefore. Now let us turn to the Pompeian tablets referred to earlier: they come from the house of one L.(?) Caecilius Jucundus, a banker, and are receipts from various *domini* in respect of sales of the sort we are considering. For all the varied forms in which they are couched, the substance is the same: they speak of payment to the *dominus* of the sum *stipulated* by the *argentarius* in respect of the *dominus'* auction (*Quae pecunia venit in stipulatum* (*Caecili*) *ob auctionem* (*domini*)). The following is an example:—

> HS. n(ummum) CCIƆƆ∞XXXVIIII, quae pecunia in stipulatum L.Caecili Iucundi venit ob auctionem Umbriciae Ianuariae mercede minus persoluta habere se dixsit Umbricia Ianuaria ab L.Caecilio Iucundo.

(C.I.L. IV,3340 N.25—interior).[29]

It is, of course, arguable, that *auctio* (*domini*) in this connection is simply a loose and understandable, though strictly inaccurate, expression indicating the substance of the transaction that has been concluded: the reference to the *dominus'* auction derives from its being his property which was sold; but the *argentarius* might still be in law the person who sold it. The *argentarius* was thus vendor to the *emptor*, the stipulation in respect of which the price is payable being made, so to say, to provide the *argentarius* with a simplified cause of action if it became necessary for him to sue for payment.

Assuming for the purposes of argument that this were so, it then becomes necessary to explain the existence of the *exceptio mercis non traditae* and *exceptio redhibitionis* which Lenel[30] rightly discusses under the rubric *Si ex contractibus argentariorum agatur.*[31] A stipulation of the type at present under discussion would be made presumably to novate or at least to supersede the buyer's liability on the sale as between him and the *argentarius*. Though the buyer thus became liable to a *condictio* or *actio ex stipulatu*,[32] the banker would still have his own obligations under the sale[33]; and to sue without having performed or being ready to perform them would amount to *dolus*.[34] If the stipulation were of novatory intention in some such form as "Do you promise to pay me HS. . . . if I deliver. . . ." then again the buyer would have no need of special defences, if sued before delivery. And on the question of novation as such, anyhow, it has been recently argued[35] that for novation of an obligation giving rise to a *bonae fidei iudicium* —of which sale is the classic illustration—a stipulation for *quidquid dare facere oporteret* would be necessary: and, of course, if this were so, an *emptor* sued on such a stipulation would have been able to raise in the action against him any matter that would have been relevant in *actio ex vendito* as affecting the "*bona fides*" of the position between the parties—and that without pleading any defence, let alone a special defence.

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[27] G.IV.126a; D.5.3.18.pr.; 44.4.5.4; 46.3.88.

[28] In the Pompeian tablets generally, there is no reference to the relation between banker and *dominus*; but *cf.* D.46.3.88 and pp. 61–63 below.

[29] For the different parts and forms of the tablets and their significance, *cf.* Mommsen, *op. cit.*, 235 *et seq.*; Bruns, Klein.Schrift. II, 319 *et seq.*; Zangemeister, C.I.L. IV, 3340.

Yet we are informed of these special *exceptiones*, whose existence, it is submitted, the foregoing considerations render difficult of comprehension. Even if, for instance, it be assumed that they precede the appearance of the *exceptio doli*—and for such assumption there is no evidence or warrant—one can see no reason for their retention after its emergence (though the names then might indicate the substance of particular instances of *dolus*),[36] in respect of transactions entirely between the *argentarius* and *emptor*. Their very existence, it is thought, suggests that someone other than the plaintiff against whom they would be set up (*i.e.*, *argentarius*) is the party who did not deliver or who has received the thing back.

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[30] EP, 3rd ed., § 272.

[31] Together with another (*exceptio pecuniae pensatae*) which is not here relevant: *cf*. Lenel, *op. cit*., p. 504, n. 3.

[32] Dependent on the nature of the stipulation, whether for a specific sum or for an unliquidated obligation: on which see n. 35, below.

[33] Sale being a bilateral contract, the position is different from that of a stipulation superimposed upon a unilateral obligation, as *mutuum*; for which, *cf*. D.46.2.61.7.

[34] *Cf*. D.19.1.13.8; 44.4.5.1, 5.

[35] Daube, 66 Z.S.S. 91 *et seq*.

And here another point becomes relevant. Ordinarily, on a promise to a third party (which did not constitute a novation of the obligation), an *exceptio* derived from the original obligation would not avail one. A plea of the *Lex Cincia*, for instance, which one might have if sued on a promise by X would be no defence in an action by Y, to whom one had promised the sum at X's request.[37] Now, if the sale were between the *dominus* and the *emptor*, it would clearly be undesirable that, in respect of auction purchases—where notoriously the *argentarius* was, so to speak, the presiding genius—the buyer should not have available in an action by the latter on the stipulation of the price the defences apparent in the names of the *exceptiones* under discussion: equity and the lofty view taken of the banker's responsibility[38] demand a difference from the normal rule. Is it not then legitimate to see in these *exceptiones argentariae* special creations to meet this situation in auctions where the *argentarius* had a claim for the price due on a contract made between two other persons, *dominus* and *emptor*?

This submission inevitably makes necessary an explanation of *D.44.4.5.4* (Paul 71 *ad ed.*).

> Si servus veniit ab eo, cui hoc dominus permisit, et redhibitus sit domino, agenti venditori de pretio exceptio opponitur redhibitionis, licet iam is qui vendidit domino pretium solverit (etiam mercis non traditae exceptione summovetur et qui pecuniam domino iam

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[36] In the manner of D.2.14.16.1 where Ulpian is certainly speaking of the substance of the defence and not of the (technical) *ex doli*. *Qu.* whether this could be the position in D.44.4.5.4 which is from Paul *de exc. doli mali et metus* (Pal. Paul 792)—see pp. 49–50, below.

[37] *Cf.* D.44.4.5.5; 23.3.78.5; and see Daube, *op. cit.*, 104.

[38] *e.g.*, D.2.13.10.1; 42.5.24.2.

> solvit) et ideo is qui vendidit agit adversus dominum. eandem causam esse Pedius ait eius, qui negotium nostrum gerens vendidit.

That the text is relevant to the present discussion is indisputable, though there is no mention of the *coactor* here, a fact which might apparently leave one to assume either that the *exceptiones* under consideration were not the offspring of the *argentarius*' action or else that the *argentarius* is the vendor in an auction ; for a distinction is clearly taken between the vendor (*is cui dominus permisit*) and the *dominus*, to whom, it is clear, *redhibitio* is made. There is, however, little doubt that the text as we have it has been treated by the compilers, though the extent to which it has been manipulated may be the subject of dispute.[39] As it stands, to say no more for the moment, the text is clearly concerned with a mandate relationship, as is made manifest by the final suggestion of the applicability of the principle involved to a *negotiorum gestor*. Nowhere else—if the text in its present form does concern the *argentarius*—is the *dominus/argentarius* relationship indicated as one of mandate. Anyhow, accepting that the vendor be the mandatary of the *dominus* referred to, the question arises, what form of action is under discussion? For the buyer would have needed no special defence in the case of an *actio ex vendito* against him, being able to raise anything therein that would have been valid against the mandator.[40] Moreover, in an action like that *ex vendito* which was for *quidquid dare facere oporteret ex fide bona*, the defendant would not need to plead a defence specially at all, which affected the issue of *bona fides*; yet the language of the text—*exceptio opponitur . . . exceptione summovetur*—would seem to preclude the suggestion that the jurist was here talking of the substance of the plea that might arise as distinct from an *exceptio*, a technical defence in its own right.[41] Thus the text must be taken to refer to an action on a stipulation: and why an ordinary vendor who was mandatary of the owner of the thing should stipulate for the price from the buyer is not readily visible. It is surely much more probable that the present state of the text reflects the fact that the private auction had disappeared before the deliberations of the compilers who have adapted to their favoured topic of representation (authorised or voluntary) a text which undoubtedly opened originally:—*Servus qui veniit per argentarium. . . .*[42] So viewed, *D.44.4.5.4*, it is thought, does not invalidate the suggestion that the *exceptiones* here discussed are more consistent with the concept of *stipulatio argentaria* being the only legal bond between the *emptor* and the *argentarius*.

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[39] Ind.Itp.: add Schulz, *Principles*, 94. n. 3; Arangio-Ruiz, *Mandato*, 67, n. 6; Talamanca, *op. cit.*, 126 *et seq.*

[40] *Cf.* D.44.4.5.5; 2.14.16.1.

Further support for this view, it is submitted, may be found in the *Lex Metalli Vipascensis* which regulates various monopoly rights in the Portuguese mining area concerned.[43] Chapter I, in the most accepted restoration, runs as follows[44]:—

> Centesimae argentariae stipulationis. Conductor ea(*rum stipulationum quae ob auctio*)nem intra fines metalli Vipascensis fient, exceptis iis, quas pro(curator) metallorum iu(*ssu imp*(*eratoris*) *faciet, centesimam a vendito*)re accipito. Conductor ex pretio puteorum, quos proc(urator) metallorum vendet, cen(*tesimam ne exigito*). Si instituta auctione universaliter omnia addicta fuerint, nihilo minus venditor ce(*ntesimam conductori socio acto*)rive eius praestare debeto. Conductori socio actorive eius, si volet stipulari a v(*enditore, is promittito. Conductor*) socius actorve eius ⟨*eius*⟩ quoque summae, quae excepta in auctione erit, centesimam exigito. (*Qui res sub praecone*) habuerit, si eas

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[41] See also Talamanca, *op. cit.*, 127, n. 2.

[42] *Cf.* Lenel, *op. cit.*, 504, n. 2.

[43] On the *Lex*, *cf.* Mommsen, Schönbauer, Talamanca, *op. cit.*: Demelius, 4, Z.S.S. 83: Bruns, *Klein.Schrift.* II, 297: Platon, *op. cit.*

[44] FIRA 1 (*Leges*), 502 *et seq.*: variants in Bruns, *Fontes*, 7th ed., 289 and Schönbauer, *op. cit.*, 390. The present version is adopted because preferable in itself and also since it is that accepted by Mommsen, the protagonist of the idea that the banker was as vendor in an auction.

> non addixerit et intra dies decem, quam sub praecone fuerint, de condici(*one vendiderit, nihilo minus con*)ductori socio actorive eius centesimam d(are) d(ebeto). Quod ex hoc capite legis conduct(*ori socio actorive eius debebitur*), nisi in triduo proximo, quam debere coeptum erit, datum solutum satisve factum erit, du(*plum d*(*are*) *d*(*ebeto*)).

The essence of the first sentence bears a clear resemblance to the substance of the Pompeian receipts—stipulation of the price made in respect of auctions held in the territory, with *conductor* (*i.e.*, concessionaire) to receive 1/100 from the vendor save in respect of State sales (*i.e.*, those by the *procurator metallorum*). Whether in this place the 1/100 spoken of is the usual *argentarius*' remuneration or rather the tax levied on auctions, need not be here decided[45]: what is clear, in the writer's view—and it is the significant point for the present discussion—is that the *conductor* is distinct from the vendor (for he could hardly exact from himself!) and that the vendor is *qui res sub praecone habuerit*. The conclusion surely is that the *conductor* is entitled to 1/100 on the stipulation where a purchase is made from *qui res sub praecone habuerit*.

Again, though principally important from the point of view of the *dominus/praeco* relationship, *D.41.4.2.8* (Paul 54 *ad ed.*) is also relevant in the present connection:—

> Tutor ex pupilli auctione rem, quam eius putabat esse, emit. Servius ait posse eum usucapere: in cuius opinionem decursum est eo, quod deterior causa pupilli non fit, si propius habeat emptorem, et, si minoris emerit, tutelae iudicio tenebitur ac si alii minoris addixisset: idque et a divo Traiano constitutum dicitur.[46]

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[45] Mommsen, *op. cit.*, 233–235 regards it as referring to the banker's commission: for the view that it is the auction tax (which the writer prefers) see Schönbauer, *op. cit.*, 390 and Talamanca, *op. cit.*, 147 *et seq.* It seems likely that the *conductor* purchases a franchise to levy the tax which else would be taken by the State and from which, not surprisingly, State sales are exempted.

[46] D.41.4.2.9 really goes with the text but merely repeats its provisions as for the *procurator* and *negotiorum gestor* and is therefore omitted.

The problem is whether the tutor can usucapt *pro emptore* goods which he buys at the auction which he himself holds for his ward. There is no discussion of anyone other than the tutor as vendor: he it is who is regarded as having addicted the thing to himself as buyer—there is no ground for supposing a change of subject between *emerit* and *addixisset*. Assuming the normal framework of an auction, the treatment of the *addictio*—*vis-à-vis* the *praeco*—as the act of the tutor is understandable, if he, tutor, were vendor; for the *praeco* was regarded as *nuntius* of the real vendor.[47] But if the *argentarius* were vendor, it would be impossible for the jurist so to have written; for the banker was certainly not the mere *nuntius* of the *dominus*. It is, of course, possible to argue that the text concerns an auction held by the tutor himself, the absence of any mention of both the *praeco* and the *argentarius* indicating their absence from the auction discussed. Admittedly, there would presumably be nothing to prevent an individual from endeavouring himself to dispose of wares in this way: but social considerations and the general convenience of using the established means would make this unlikely in any circumstances[48]; and in the present set of facts there is also the further consideration from a legal point of view of the tutor's *culpa levis* liability in dealing with his ward's interests to suggest the improbability that anything other than the usual machinery would have been employed. It is consequently thought that *D.41.4.2.8* also supports the submission that the *argentarius* was not the vendor in an auction sale.

Let us now change our ground somewhat and approach from a different standpoint. What is there positively to suggest that the sale concluded at an auction was not between the *dominus* and the *emptor*? *D.44.4.5.4* has been already discussed, as also the inferences permissible from the *exceptiones argentariae*.[49] There remains, however, *D.5.3.18pr.* (Ulpian 15 *ad ed.*):—

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[47] *Cf.* also Schönbauer, *op. cit.*, 376–378.

[48] So also Talamanca, *op. cit.*, n. 2, pp. 114–115.

> Item videndum, si possessor hereditatis venditione per argentarium facta pecuniam apud eum perdiderit, an petitione hereditatis teneatur, quia nihil habet nec consequi potest. sed Labeo putat eum teneri, quia suo periculo male argentario credidit: sed Octavenus ait nihil eum praeter actiones praestaturum, ob has igitur actiones petitione hereditatis teneri. mihi autem in eo, qui mala fide possedit, Labeonis sententia placet: in altero vero, qui bona fide possessor est, Octaveni sententia sequenda esse videtur.

A *possessor hereditatis*, one in possession of an inheritance to which he was not entitled, has sold the estate by auction but, having made an unfortunate choice of *argentarius*, has not received the purchase price; and the question is whether he is liable to a *petitio hereditatis* because he neither has nor can get anything. Certainly he would be unable to recover anything if the *argentarius* were the vendor at the auction and had been paid off by the buyer. The sale would be finished and he (*possessor*) left only with his remedies against the *argentarius* on their relationship. But in fact the position is no different if the sale were between *dominus* and *emptor*. All that the *dominus* could look for from the buyer was the price and the implication of the text is that he has no action against the buyer for it. Naturally so, if the buyer has promised the sum to the *argentarius* in the manner for which we have hitherto argued. Even assuming, in such case, that the stipulation of payment to the *argentarius* did not novate the buyer's liability on the sale to the *dominus*, so that technically the *dominus* would have *actio ex vendito* against the buyer, the fact remains that nothing would be due to him *ex fide bona* so long as the buyer performed his promise of payment.[50] The *dominus* could thus "recover" nothing either way: that *consequi* bears this practical connotation of recovery is evidenced by the fact that Ulpian, having said that *dominus* can *consequi nihil*, goes on to mention his actions —which would of course be barren since presumably the *argentarius* has nothing and the buyer has already performed his obligations and thus is immune. *D.5.3.18pr.* thus does not prevent acceptance of the view here adopted: to regard it as based upon a sale in which the *dominus negotii* is vendor is quite consistent with the decision contained.

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[49] Above, pp. 46–48.

[50] *Cf.* Daube, *op. cit.*, 103 *et seq.*

There remain further considerations also. From a practical point of view, the payment of the price is, as said, the only obligation of the buyer really relevant in an auction [51]; and if that is promised by the *emptor* to the *argentarius*, then, really, there would be nothing for the *dominus* to look for from the buyer. But, from the buyer's point of view, there were various vendor's liabilities apart from that of delivery of the *res* which would be of significance: what, for instance, of the warranty against eviction or that against defects which, at least originally, had to be expressly assumed by someone and went through a further intermediate phase of being exigible by the *actio ex empto*? [52] It is, of course, possible that the conditions of sale should exclude such warranties. But the very existence of the *exceptiones argentariae* suggests that the prophylactic magic of the exclusion clause was not invoked in the measure familiar in the modern world to render a purchaser defenceless: the reference in *G.IV.126a* to the possibility of a *replicatio* to the *exceptio mercis non traditae* that the *res* was not to be delivered before payment indicates that, without such a condition, delivery might precede payment; while *redhibitio* cannot have been confined to circumstances favouring the vendor. But can it be thought that the *argentarius* undertook the warranties under discussion? It has been already noted and will be reverted to hereafter that the *argentarius* provided credit, paying off the *dominus* perhaps before being paid himself by the buyer[53]; confirmation thereof, it is thought, appears in *D.40.7.40.8* (Scaevola, *Dig.* 24) discussing manumission of his *actor* slaves by a *coactor argentarius* who left an estate consisting almost entirely of book-debts (*paene totam fortunam in nominibus haberet*). The banker thus in effect assumed the risk of the buyer's inability to pay, in any case,[54] while a paid-off *dominus* might possibly prove indigent by the time that settlement day came and the buyer defaulted, and so in fact incapable of repayment. For a return of 1 or 2 per cent. of the price realised, the assumption of this risk, albeit remote, plus the further liabilities now under discussion, would scarce be an alluring prospect, even though *coactio* was probably not a general banking activity.[55] Probability suggests that the *argentarius* restricted himself to the provision of cash and the exacting of the price—it was for this that he received his fairly small commission. And, if the *argentarius* did not undertake the liabilities in question, who else but the *dominus negotii* would have been responsible? And it would surely be more reasonable to conceive of such liability in the *dominus* when he is vendor even though, by reason of his own arrangement with the *argentarius*, he is not in a position himself to sue for the price: to him the banker has taken the place of the buyer for payment—but that does not affect his normal duties towards the buyer. Such a state of affairs would certainly render unnecessary any discussion of the relations of buyer and seller in respect of any obligation other than that of paying the price—for they would be the ordinary rights and liabilities of any vendor and buyer under the contract of *emptio venditio*. It would be only the stipulation of payment to the *argentarius* and the possible effect on liability thereunder of the vendor's breach of any of his obligations which would be of juristic interest

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[51] *Addictio* is an integral part of the proceedings and a *lex commissoria* would seem precluded by the interposition of the *argentarius* so that a duty of return becomes remote. See also Seneca, de Bene. 4, 13: *hoc dabo, hoc recipiam, auctio est*; . . .

[52] P.Sent, II.17.2. On the warranty against eviction, the *locus classicus* is, of course, Girard, *Mélanges II*, 1 *et seq.*: see most recently, Arangio-Ruiz, *Compravendita* (1954 ed.), Chaps. vi and vii.

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[53] Above, p. 44 and n. 17; below, pp. 56–59.

[54] *Cf.* Schönbauer, *op. cit.*, 380; Mommsen, *op. cit.*, 230–232.

[55] See p. 62, below.

—and, as we have seen, it is precisely those features which are discussed in the texts which we have.

It may further be added that the impression which is emerging is confirmed by the non-juristic sources from the earliest ones onwards. Plautus, though he certainly knows bankers, treats of auction sales in which a *praeco* is present; but there is no mention of *coactores*.[56] And, while *coactores* are known to Cato, it is in terms which suggest a distinction between the vendor and the *coactor*.[57] To take but one instance from Cicero, we are told in *Pro Caecina* VI, 16,

> Fundus addicitur Aebutio: pecuniam argentario promittit Aebutius: quo testimonio nunc vir optimus utitur sibi emptum esse

in which sentence *argentario* is the first reference, in connection with that auction, to the participation of the *argentarius*. Again, by way of further example, let it suffice to cite Quintilian (*Inst.Or.XI.2.24*) who, discussing memory training, records,

> Qui auctione dimissa quid cuique vendidissent, testibus argentariorum tabulis reddiderunt

where again the *argentarii* are certainly not identical with the vendors.[58]

It is also not unprofitable in the present connection to speculate on the possible origin of the participation of *argentarii* in auctions. As has been indicated, they are known to Cato writing possibly at about the same time as, certainly not much later than,[59] Plautus who does not mention their presence. Cato is concerned with agricultural sales; in particular, in chapters 146–150 he is dealing with the terms of sale of various forms of produce, chapter 146 containing the standard terms and the subsequent paragraphs the special provisions for each type of merchandise. And that such sale would be by auction there is little doubt.[60] Our present specific concern is with chapters 146 and 150 which both deal with sale as between *dominus* and *emptor* (to use the terminology hitherto adopted) both deal with the sale of the produce concerned before it is actually available (standing crop of olives in c. 146 and wool and lambs in c. 150)[61] and both mention a period of ten months. In c. 146, the reference must be to a period of credit allowed to the buyer (though a provision for the buyer to add the *centesima* to the price indicates the participation of an *argentarius*)[62] and reads:—

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[56] See Thes.Ling.Lat., s.v. *Coactio* and *Coactor*. There is a possible reference in Asinaria I, 203—

Vetus est "nihili coactiost"—scis cuius, non dies amplius.

But another ms. has "coaetiost" and the allusion is to some saying which is not identifiable from any other source; hence the matter remains doubtful. In any event, it is still true that no *coactor* appears in Plautus' own auctions (*e.g.*, in Menaechmi, Stichus). For Plautus as evidence of the Roman legal institutions of his day, see now Pringsheim, *Greek Law of Sale*, 419 *et seq.* and Arangio-Ruiz, *Compravendita*, 73 *et seq.* In the present connection, Plautus may be taken to be dealing with Roman sale, the Greek auction differing somewhat.

For Plautus on bankers, see n. 78, *post*.

[57] De re rustica, cc. 146, 150, considered further below.

[58] See also Schönbauer, *op. cit.*, 377–378.

[59] *Cf.* Daube, *Forms of Roman Legislation*, 93–97.

> Dies argento ex K.Nov. mensum X oleae legendae faciendae quae locata est, et si emptor locarit, Idibus solvito.

C. 150 contains the following:—

> † die lanam et agnos vendat menses X ab coactore releget.

That the sentence as it stands is defective is universally admitted; a probable amendment in the writer's view would be:—

> die lanam et agnos vendat mensum X, ab coactore releget (sc. pecuniam).

(Let (the vendor) sell the wool and lambs with a (credit) period of ten months; he will recover (sc. money) from the *coactor.*)[63]

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[60] See his early adjuration, *Auctionem uti faciat*: de r.r. 2, 7. All citations of Cato are from the Teubner edition by Goetz.

[61] Hence discussions on whether the sale is analogous to the *emptio spei* of later times or rather to that *rei speratae*: *cf.* Arangio-Ruiz, *Compravendita*, 75–76; Talamanca, *op. cit.*, 109, n. 2.

[62] Qui oleam emerit, amplius quam quanti emerit omnis pecuniae centesima accedet.

[63] For various readings, *cf.* Keil's edition of Cato and Varro, Vol. II, 158 *et seq.* The final verb must be *relegere* (so Lewis & Short) and not *relegare* (thus Keil, *cit.*, and Till, Cato als Sprachschöpfer (49 Philologus, Suppl.Bd. 28)), which in the present text would be nonsense. It is no strain to see "*pecuniam*" implied,

The indications, then, are of a sale of agricultural produce with a period of credit, necessary probably because the buyer would himself need to raise the money by disposition of the treated produce (*e.g.*, oil and *amurca* obtained from the olive crop bought; prepared wool out of the clippings, etc.). But the small Roman or Italian farmer of the period would not himself be able to give credit to the buyer of so long a period.[64] May one not suspect the introduction in such circumstances of recourse to an *argentarius* who could both provide the vendor with cash relatively speedily and also enable the buyer to obtain the credit necessary to him, by in effect taking over his risk from the *dominus*? The appearance of the *argentarius*, in short, was entirely of an economic origin.

At the time of which we speak it is pretty certain that the consensual sale as later conceived was yet unknown and probable that its existing predecessor was the stipulatory promise of the vendor to deliver the *res* as against the buyer's similar undertaking to pay the price.[65] No difficulty would arise in such a picture, where the assistance of an *argentarius* was desired, in the vendor's *delegatio* of the

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though unwritten, as the object with *relegere*: but what would one have to *supply* in the text to treat the verb as *relegare*?—and *mutatis mutandis* the same objection applies for Gronovius' suggestion "*deleget.*"

Accepting that the verb is *relegere*, the abrupt change of mood as between *vendat* and *releget* need occasion no surprise; the surrounding sea of subjunctives does not prevent the intrusion of *cedent* in the immediately preceding sentence of c. 150; and in other paragraphs before c. 150 there are examples of not dissimilar changes of mood. For the use, *dies mensum X* "a period of 10 months," *cf. senum mensum die* in Ulp.Reg. 6.13.

Mommsen in Bruns, *Fontes*, 6th ed., would read (Ex quo) die lanam et agnos vendat menses X ab coactore releget. = 10 months after he sells the wool and the lambs, he will recover. But Cato seems to have been most punctilious in his expressions of time: c. 112 is an excellent illustration of his practice in this respect. The accusative alone, *menses X*, would certainly mean "throughout the period of 10 months" which is clearly nonsense here. To give the sense that Mommsen seeks, the sentence would have run (unless Cato here were guilty of an unusual aberration) *Ex quo die . . . decima mense* or *intra decem menses. . . .*

I would acknowledge valuable and stimulating discussion with Professor C. J. Fordyce.

[64] For the agriculture of the time, *cf.* Mommsen, *History of Rome*, Bk. III, ch. 12: Salvioli, *Le Capitalisme dans le Monde Antique.* On the low estimate of vine-growing a century later, *cf.* Aymard, *Les Capitalistes Romains et la Viticulture Italienne* (Annales, 1947).

[65] On the origins of consensual sale, most recently Arangio-Ruiz, *Compravendita*, Ch. i; Pringsheim, 32 R.H.D. 475; Meylan, 21 T.v.R. 129 *et seq.*

buyer to the banker: the buyer simply promised the price to the banker instead of to the vendor, who in his turn would be protected by the promise of the sum from the banker. There is no need to suppose that this was from the beginning an integral part of auction machinery, but its advantages would be obvious and one could easily understand the spread of banker participation from the agricultural world into business generally. Moreover, the banker, as a man of business, would be likely to have the facilities that would render it easier for him to develop a smooth-running procedure for the conduct of auction sales, which could and would be adopted even in cases where there was no need for credit. Thus there arose in fact a banking monopoly of the auction world which, if anything, developed with the emergence of consensual sale: certainly the essential structure, as envisaged, would not be upset by the appearance of the new informal contract between the vendor and the buyer.[66] This is, of course, in detail, speculation: there can, however, be no doubt of the inherently economic nature of the participation of the *argentarius* in auctions or of the impression emergent from the texts of Cato and Plautus that, in the then prevailing form of sale, the *argentarius* was not a legally necessary participant at the sale itself: and there is no reason to suppose an alteration of his standing with the development of the consensual sale.

In the light of all the considerations advanced, it is therefore thought, the impression appears ever more strongly that the sale at an auction was concluded between the *dominus* and the *emptor*, the *argentarius/emptor* relationship deriving from the latter's promise by stipulation to pay the price to the banker.

There remain certain subsidiary problems—the position of the *praeco*: the relationship of *dominus* and *argentarius*: the legal nature of bids before acceptance—were they revocable?

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[66] Talamanca, *op. cit.*, 109 *et seq.* comes to a similar conclusion.

II

To take first the position of the *praeco*. He was the *nuntius* (on the view here taken) of the *dominus* at the sale, *i.e.*, a mere means whereby his principal communicated with the other party to the contract, the buyer. Indeed, since Roman law had no concept of true agency or representation, his position could hardly be otherwise. As we have seen, no authority permits of one's arguing for anyone other than the *argentarius* or the *dominus* as vendor in the auction. And as already noted,[67] the act of *addictio* was regarded as the act of the *dominus*, which (whatever one's views on the sale relationship previously discussed) would have been impossible if the *praeco* had a standing as himself a participant in the conduct of the bidding and not simply as, so to speak, a "mouthpiece" for the *dominus*. It would also seem in consequence that there was no necessity, legally speaking, for the participation of a *praeco* in an auction: the *dominus* could clearly do no less effectively (legally) in person what could be done through the *praeco*. In fact, however, it is no less clear that in practice he was a regular, indeed integral, part of the auction machine: one would not expect the *dominus* to cry his own wares or to cajole bids at the sale. The references to the *praeco*, indeed, from Plautus onwards suggest that, from this point of view, he was earlier an indispensable participant than was the *argentarius*.

It is also apparent that his was a separate calling from that of the *argentarius*: the *Lex Metalli Vipascensis* Ch. II discusses *praeconium* as an independent concession from that of Ch. I, indicating a remuneration for the *praeco* seemingly on the same scale as that of the *argentarius*, payable by the vendor save in the case of State sales by the *procurator metallorum* in his official capacity—in which case it was the duty of the concessionaire to provide the

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[67] Above, p. 52.

procurator with a *praeco* and the buyer paid the fee.[68] This, of course, does not preclude the possibility, indeed the probability, that there was a close link between *praecones* and *argentarii*.[69] The point is that, however close in practice, they were legally separate and consequently the *dominus/praeco* relation would be a distinct one. And the question is, what was its nature? The fact of his being no party to the sale for all that it was he who took bids and eventually accepted one, taken in conjunction with the existence of a regular rate of remuneration, it is submitted, strongly suggest not *mandatum* but *locatio conductio*[70] if the relationship was left to be governed by a consensual bond. It is, however, probable that, for reasons which will appear in the later discussion of the *dominus/argentarius* relation, it was regulated in fact by stipulation.

III

The apparent flat rate of remuneration would again suggest *locatio conductio*, if one is to consider the *dominus/argentarius* relation in terms of consensual contracts: there is also, as the Pompeian tablets show, the designation of the remuneration as a *merces*, as is the reward payable in *locatio*.[71] On the other hand, the only text which directly discusses the possibility of an action against the *argentarius* speaks—as do the *emptor/argentarius* sources—of action on a stipulation. It is *D.46.3.88* (Scaevola, *Dig.* 5): a mother, conducting the affairs of her daughter who is the intestate heiress of her deceased father, *res vendendas per argentarios dedit*; the question was whether the daughter had any action herself against the bankers, *quando non ipsa stipulata sit pretium rerum quae in venditionem datae sunt, sed mater.*[72] Moreover, the banker's profession was regarded as something of a public calling[73] which tends to put aside notions of even *locatio operis*. Another point arises here, however. The admittedly late Porphyrio observes, "... *argentarius scilicet coactor, quod humile ac turpissimum genus quaestus habebatur*"[74]: Mommsen opined[75] that those *argentarii* who operated as *coactores* were a (legally) restricted class; others, without going so far, have thought it not improbable that not all bankers engaged in this activity.[76] It is thought that it may well have been that auction work was a somewhat despised aspect of banking operations[77] and consequently was practised in fact only by some members of a profession which, generally, seems to have been regarded with respect,[78] so making for a *de facto* restricted range of *argentarii coactores*. In any event, it is submitted, it is probable that not all bankers would engage in this line of business and therefore possible that a prospective vendor's normal banker, if he had one,[79] did not. Anyhow, whatever the scope of the individual banker's activities, auctions are unlikely to have been a regular transaction of the given client, although auctions generally might provide the particular banker with a regular line of business. In short, all the indications—together with the economic origin of the banker's intervention in auctions—

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[68] Scripturae praeconii. Qui praeconium conduxerit, praeconem intra fines praebe(*to. Pro mercede ab eo qui venditionem*) XL minoremve fecerit, centesimas duas, ab eo qui maiorem XC fecerit, centesimam exig(*ito. Qui mancipia sub praecone venum*)dederit, si quinque minoremve numerum vendiderit, capitularium in singula capita (*X . . . si maiorem numerum vendi*)derit, in singula capita XIII conductori socio actorive eius dare debeto. Si quas (*res proc*(*urator*) *metallorum nomine*) fisci vendet locabitve, iis rebus conductor socius actorve eius praeconem praestare debeto. . . .

See also literature cited in n. 43, above.

Beseler, 46 Z.S.S. 267 *et seq.* is wrong in saying that the *procurator* "eigenhändig versteigert."

[69] As, *e.g.*, house purchase in modern times through a building society involves resort to a particular insurance company: somewhat differently, see Talamanca, *op. cit.*, 142–143.

[70] *Operis faciendi* or *operarum*? *Semble*, the former: see also Mommsen, *op. cit.*, 229.

[71] *Cf.*, *e.g.*, D.19.2.2pr. and Mommsen, *loc. cit.*

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[72] The text is widely suspected—*cf.* Ind.Itp. and add Frezza, 11 Aegyptus at 367 - but not on grounds which affect our present concern.

[73] D.2.13.10.1; 42.5.24.2.

[74] Ad Hor.Serm. I.6.86.

[75] *Op. cit.*, 232–233.

[76] *e.g.*, Talamanca, *op. cit.*, 113, n. 3.

[77] For banking activities generally, *cf.* Deloume, *Les Manieurs d'Argent à Rome*, 151 *et seq.*

[78] *Cf.* Deloume, *op. cit.*, 172 *et seq.* The outbursts of Plautus (*e.g.*, Curculio, V, 3) may be likened to the modern popular conception of the legal profession which (at least, one hopes so), though jibed at, is respected—*cf.* Gower, 3 J.S.P.T.L. (N.S.) 115, n. 4.

[79] *Cf.* pp. 56–59, above: the early farmer would have been unlikely to patronise one. For current accounts at Rome, see Deloume, *op. cit.*, 165 *et seq.*

point to individual *ad hoc* transactions between *dominus* and *argentarius* in the particular case, whether or not the banker regularly indulges in auction business and whether or not he be the regular banker of the instant *dominus*. And for such a situation the stipulation is the ideal means of creating the appropriate obligations. It is consequently thought that *D.46.3.88* probably indicates the normal situation between *dominus* and the *argentarius*—the former promised the *coactor* his appropriate reward while the banker in turn promised to pay to the vendor the amount of the bid accepted. It is this comparative rarity of the auction in respect of the individual *dominus negotii* which suggests the existence of a relation by stipulation between him and the *praeco* also.[80]

IV

A question recently raised is the legal basis of the buyer's liability to promise to pay the *argentarius*. If the picture presented in the foregoing pages be accepted, the auction consists in an ordinary sale between *dominus* and *emptor* (effected through the *praeco*) to which the banker is an outsider, the buyer simply promising by stipulation to pay him the price. What then would be the position if, after the *res* was addicted and thus sold to him, the successful bidder refused to promise the price to the banker? The solution offered by Dr. Talamanca who raised the question[81] is that the sale must have been subject to a condition that the buyer should so promise, with the result that, if he failed to do so, the *res* was unsold; *i.e.*, a true condition precedent. The problem is of course in any case an academic one which could arise only once the consensual sale was in being, whereby the informal agreement between *dominus* and buyer itself produced a legal obligation. The regular course of an auction would be known to everyone and a person who participated in the bidding at the sale would know what was expected of him, whether or not the provision that the buyer should promise to the *argentarius* responsible expressly appeared in the conditions of sale. The duty to promise would thus be a term of the contract between the parties to the actual sale, which the *dominus* should be able to enforce by *actio ex vendito* in the unlikely event of its being necessary to do so [82]; which right of action he could, as it were, assign to the banker by a *procuratio in rem suam*. Though this suggestion is criticised by Dr. Talamanca as not giving the banker much protection, it in fact affords him more than does the learned author's own solution: for, if the thing were unsold as a result of the buyer's recalcitrance, there would be no price payable and thus no commission for him. On the view here presented, since there is certainly a good sale between the vendor and the buyer, the vendor has a good action against the buyer which is assignable, as said, to the banker who could thus ensure his commission.[83] Naturally, if the buyer paid the vendor direct, the banker would be able to recover his due from the *dominus*, who has promised him the relevant percentage of the price.

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[80] *Cf.* p. 61, above.

[81] *Op. cit.*, 138–139.

V

A final question connected with these, so to speak, mechanics of the sale is that of the status of a bid: could a bid once made be revoked before the *addictio* which settled the sale? This possibility was accepted—on the strength of an epigram of Martial (VI. 66)—by Schönbauer.[84] But, without more, this is very slender support for the proposition. There can be no dispute that the bidder at the auction, in modern contract parlance, made the offer which, if accepted by the vendor, concluded a contract.[85] The *addictio* process of the vendor is of course based on *in diem addictio*,[86] a provision for the vendor's benefit whereby in a sale the contract was concluded with the present party unless a better offer were forthcoming within the specified time. *D.18.2.1* (Paul 5 *ad Sab.*) gives a specimen formula:—

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[82] *Cf.* D.2.14.4; 2.14.7.7.

[83] In any event, the condition attaches to a sale between the *dominus* and the *emptor* and is within the latter's power, a so-called "potestative condition." It is submitted that a buyer's failure to promise would suffice to invoke the principle "*condicio pro impleta habetur*" (D.50.17.161) and so again make the *emptor* liable to an *actio ex vendito* (*cf.* D.18.1.50) with the consequences stated in the text.

[84] *Op. cit.*, 380. The poem is:—

Famae non nimium bonae puellam
Vendebat modo praeco Gellianus.
Parvocum pretio diu licerent
Attraxit prope se manu negantes—
Quid profecerit osculo requiris?
Sescentos modo qui dabat, negavit.

> In diem addictio ita fit: "ille fundus centum esto tibi emptus, nisi si quis intra kalendas Ianuarias proximas meliorem condicionem fecerit, quo res a domino abeat."

This shows an acceptance of the party addressed as the buyer, subject to a condition which is suspensive or resolutive according to the circumstances of framing, etc.[87] For present purposes, whichever the form of the condition would make no difference, though the suspensive seems naturally the more probable: the point is that the bid made is accepted by the vendor, subject to a better bid forthcoming. A conditional contract would thus be instituted between the *dominus* (through the *praeco*) and the bidder when a bid was acknowledged; and an attempt by the bidder to revoke his bid would thus be an actionable breach of contract. The existence of one such contract would not prevent the acknowledgment of further bids[88]—and consequent conclusion of similar contracts—until the limit was reached, when the vendor's acceptance of the last completely released the previous other bidder. In short, the form that auction bidding and acceptance took would indicate that all bidders in succession became conditionally bound to the vendor—

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[85] *Cf.* the controversy between Kindervater and Ihering in the latter's Jahrbüch., Vol. 7. Ihering's own contribution may be found in his Ges.Aufsätze II. 67 *et seq.* See also Ihering. 4 I.Jahrb., 93 *et seq.* (Ges.Auf. I. 327, 408 *et seq.*).

[86] It is probable that originally the sale in which the banker later came to participate was by straight *addictio in diem*, by imitation from public law (where Livy II.17.6 records an auction back to the fifth century B.C.)—the probable source of conditions generally: *cf.* Mitteis, RPR 167 *et seq.*

[87] D.18.2.2pr.

[88] *Cf.* D.18.2.11pr.; de Zulueta, *Roman Law of Sale*, 56, n. 7.

and consequently that only he had a choice in respect of bids once made: he could reject—the bidder could not revoke.[89]

Conclusion

If the foregoing pages be accepted, it will be seen that between the outward appearance of the Roman auction and its legal structure there was a wide gulf. In fact the banker organised and financed and was indispensable to the regular conduct of the sale; in law, he provided the circumstances in which the *dominus* and *emptor* could conclude their sale, to which he was no party. The original entrance of the *argentarius* into the auction world was motivated by economic considerations and his rôle remained essentially that of the forerunner of the modern finance company or building society.[90]

J. A. C. THOMAS.

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[89] Similarly Ihering, Ges.Aufs. II, *cit.* Of course, acceptance of a later bid effectively released the earlier bidder whose bonds were thus of a fleeting nature.

[90] I wish to thank Professor D. Daube who kindly read this article and made helpful criticisms.

CASES AND COMMENT

1. SCOTTISH CASES

CUSTODY—relevance of religious upbringing.

Mackay v. *Mackay* (1957 S.L.T. (Notes) 17) raised no interesting point of law but it did raise an interesting issue of the application of the law to somewhat unusual facts. The case was a petition for custody of a girl aged seven by the father against the mother; each party averred that the other was unsuitable to have the custody of the child, and the main issue turned on the fact that the petitioning father was both a Communist and an atheist. So far as the material aspects of the child's welfare were concerned, there was little to choose between the two homes offered, one in Golspie and one in Brixton; the material difference was in the moral and spiritual influences which might be brought to bear on the child. The mother was a Roman Catholic, the father a Communist and atheist, and the Lord President pointed out that it would be " almost impossible for a court in Scotland to award custody to an atheist with the prospect of the child being brought up without the solace and guidance of any religious teaching at all, and had I considered that this result would take place in the present case I should have had the greatest hesitation in awarding custody to the petitioner, however fitted he might be in other respects to have the child with him. For atheism and the child's welfare are almost necessarily mutually exclusive, according at least to our standards of civilised society." In the circumstances, however, the person who would actually be looking after the child was to be the petitioner's mother who proposed to give the child religious instruction, and the petitioner stated in cross-examination that, though he did not believe in religion himself, he quite approved of his mother bringing up the child in the Christian faith and giving her religious instruction. The court accordingly, accepting that evidence, awarded custody to the father with whom she had been for over two years, with the *caveat* that an award of custody was always an interim order and that, if the intentions with regard to religious instruction were not realised, it might be necessary to reconsider the issue of custody. The case is a useful recognition of the fact that while religious education must normally be according to the religion of the father (*Re Nevin* [1891] 2 Ch. 299) considerations of welfare may dictate otherwise, since it is clear that, but for the father's somewhat paradoxical evidence of willingness to have the child brought up in a religious faith, the court would have taken custody from him: *cf. Ward* v. *Laverty* [1925] A.C. 101.

D. M. W.

CONTRACT—sale of business—whether goodwill included.

In *Barr* v. *Lions, Ltd.*, 1956 S.C. 59; 1956 S.L.T. 250, the proprietors of a shop contracted to sell the heritable property, fixtures, certain moveable fittings and the business name of "Barrs' Stores," but not the business nor the stock. It was provided that the price had been enhanced by reference to the business and trading name and the sellers were taken bound by certain restrictive covenants against *inter alia*, using in future the name "Barrs' Stores," "Barrs of Cowcaddens" or any name which could reasonably be regarded as a simulation thereof. The sellers then held a sale to dispose of their stock and advertised it as "Barrs' retiral sale," saying that "Barrs are retiring. Business is sold. Barrs are selling out." The buyers resiled from the contract, claiming that the advertisements amounted to a material breach by adversely affecting the goodwill of the business, and the sellers counterclaimed for damages for unjustifiable repudiation of the contract. It was held that the business name had been sold apart from the goodwill of which it was not a part and that the advertisements did not constitute any material derogation from the sellers' obligation to maintain the continuous connection of the business name with the shop premises. Accordingly the buyers' action was dismissed and the sellers were allowed a proof as to the damage sustained by them. It was pointed out in the speeches that the word "retiral" in the advertisement, as in the more common case of retiral from a partnership, refers to the action of a person, and implies that the business is continuing. The decision would probably have been otherwise if the sale had been one of the business as a going concern, but the sale effected was not one including the goodwill and it was consequently irrelevant to consider whether the goodwill had been damaged. This tract of law is not much illustrated by modern decisions and this is an interesting one, and not least for the emphasis that sale of the business name does not imply sale of the goodwill.

D. M. W.

REPARATION
—licensee—
duty of care.

The doctrine of the categories (of invitee, licensee and trespasser) is a fertile source of legal controversy as well as of factual litigation. In *Murdoch* v. *A. & R. Scott*, 1957 S.L.T. 11, a schoolgirl aged eleven had her arm caught in the mechanism of a cement-mixer on a building site. She claimed damages from the contractors. The case was pleaded on the basis of licensee but there was ample evidence that the child had been warned away by workmen, the contractor, and by her father; she was held on the facts to be a trespasser and the defenders were assoilzied. On appeal the pursuer shifted her ground in a manner unjustified by the record or the proof and argued that the general duty of care of *Donoghue* v. *Stevenson* applied, and not the doctrine of the categories since the building contractors were neither owners nor tenants of the land to whom alone, it was contended, the categories applied. Apart from the matter of there being no record for such an argument, the court had no hesitation in rejecting the argument. The material fact in importing the doctrine of the categories was the degree of possession and control which an occupier exercised over the land on which the accident happened. As Lord Patrick put it: "if a person is in such possession and control of the land that he can forbid persons to enter on it or license persons to enter on it or invite persons to enter on it, he owes them only the duties which a trespasser, licensee or invitee is entitled to demand." It is unfortunate that the wide and general statements of *Donoghue* which are probably or almost certainly not the *ratio* of that case are so frequently invoked by counsel in despair for argument. If the Atkin dictum were given effect to in a quarter of the cases in which it is cited it would swallow most of the law of reparation and it is important to restrict it to cases which fall within the *ratio* of the case or at least are analogous to other applications of the *ratio*. Of course the controversy on what that *ratio* is still continues, as witness Mr. Heuston's article in 20 M.L.R. 1.

D. M. W.

McAuslan v. *Jack*, 1957 S.L.T.(Sh.Ct.) 8, was rather a gold-digging action where the claim was very rightly rejected. A pursuer bought a television set which, despite complaints and repairs, was faulty for most of the year before the seller took it back and refunded the price. He claimed damages for inconvenience and loss of entertainment, loss of interest on the purchase price, the cost of insurance and of the aerial he had put up. The only omissions were the cost of the licence and of the electricity to run it. It was held that there had been no breach of contract but a termination by mutual agreement, and that as *restitutio in integrum* had been effected *hinc inde* no claim of damages was competent. Even if there had been breach of an implied condition of sale it is highly questionable whether any award of damages would have been competent when complete restitution had been effected, since the repayment of the full price was certainly more than the value of the second hand set.

D. M. W.

Clark v. *Syme*, 1957 S.L.T. 32, raised a neat issue of malice in crime. Sheep were tending to stray from one farm to another across a dilapidated stone boundary wall. Farmer S. told farmer A. that unless the latter repaired the wall he would shoot the trespassing sheep. The trespasses continued and farmer S. shot a sheep; A then put up a fence. S. was charged with malicious mischief and acquitted, the learned Sheriff-Substitute holding that the presumption of malice required for the crime of malicious mischief had been rebutted by his belief that he had a legal right to shoot the sheep. On a stated case, it was held that S. should have been convicted. It was pointed out that " a misconception of legal rights however gross will never justify the substitution of the law of the jungle for rules of civilised behaviour." Mistake of law is not an excuse. It was clear that S. had deliberately intended to and had actually killed the trespassing sheep, and he had none of the excuses which may justify shooting a trespassing dog: *e.g.*, *Gott* v. *Measures* [1948] 1 K.B. 234. The requisites of the crime were accordingly fully satisfied. In England, however, in *R.* v. *Day* (1844) 8 J.P. 186 a man who impounded straying sheep and deliberately maimed them under an erroneous but bona fide belief that he was legally justified in so doing was acquitted on a charge brought under what is now the Malicious Damage Act, 1861. Alison (I, 448) makes it clear that mistake of law is no defence in the Scottish common law crime: he says, " At common law, every act of serious and wilful damage done to the property of another, whether from malice or gross misapprehension of legal right, is an indictable offence." The decision was accordingly clearly warranted.

D. M. W.

2. ENGLISH CASES

CONSTRUCTION OF STATUTES —Preamble— British nationality.

The decision of the Court of Appeal in the *Attorney-General* v. *Prince Ernest Augustus of Hanover* has now been affirmed by the House of Lords [1957] 2 W.L.R. 1. The striking and unusual features of this case have aroused much public interest. The practical effect of the decision is not only to declare Prince Ernest Augustus a naturalised British subject in terms of the Act of 1705 (4 & 5 Anne, c. 16) but also, it is thought, a large number of other " foreign " royal personages who, being Protestant, can claim lineal descent from the Princess Sophia. It would thus appear that even the late Kaiser Wilhelm II may have been British and there may have been some legitimate ground under our law of treason for the " Hang the Kaiser ! " campaign. Another striking result (see 1957 S.L.T. (News) 23) may be to bastardise the children of certain royal marriages. Under the Royal Marriages Act, 1772, no descendant of King George II, other than the issue of princesses *who marry into foreign families*, shall be capable of marrying without the previous consent of His Majesty, his heirs and successors. It is believed that on several occasions descendants of George II have deliberately omitted to ask for the Royal consent in the belief that they were marrying into foreign families when, in the light of this recent decision, it now appears that some of these families may have been British. The startling consequences which result from the invalidity of certain such marriages are thought to include the illegitimacy of the Queen of Sweden and of Princess Andrew of Greece, who is the mother of the Duke of Edinburgh.

But the law is no respecter of persons nor had the legislators of 1705 necessarily all these later unfortunate consequences in mind. Parliament may now have to think again and introduce amending legislation. In this event the case will only remain of importance as an authority on the interpretation of statutes—for this was the only law involved in the case. The result was merely to underline the principle that the preamble of a statute cannot be used to control the enacting portion itself where such is expressed in clear and unambiguous terms. One has to read the enacting words to be construed in the light of the statute as a whole (including the preamble), but the context of the preamble is not to influence the meaning otherwise ascribed to the enacting part unless there is a compelling reason for it. The preamble of the statute in question recited that on the death of Queen Anne without issue the Crown was limited to the Princess Sophia and her issue " . . . to the end [that] the said Princess . . . and the issue of her body, and all persons lineally descending from her, may be encouraged to become acquainted with the laws and constitutions of this realm, it is just and highly reasonable, that they, in Your Majesty's Life Time . . . should be naturalised." The enacting part then read " the said Princess . . . and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be . . . deemed . . . natural born subjects of this Kingdom." The question accordingly before the House was whether the latter words were capable of suffering a limitation of time which might have been expressed by adding to them such words as " during the life of Queen Anne "—a similar expression to that appearing in the preamble. But it was held there was no compelling reason for so doing, there being no real ambiguity or manifest absurdity in the ordinary construction of the words in question which imposed no such limitation.

The case might have been of more interest from a constitutional viewpoint if the Attorney-General had seen fit to follow the Lord Chancellor's encouragement and present the argument originally advanced by Professor T. B. Smith in S.L.T. 1956 (News) p. 89. This argument, namely, that the 1705 Act was abrogated by the Treaty of Union and particularly Article 25 thereof, seems to be a good one and it is difficult to see why it was never taken.

W. A. E.

INSURANCE —Master and Servant—Implied term.

Lister v. *Romford Ice and Cold Storage Co., Ltd.* [1957] 2 W.L.R. 158 has caused even greater divergence of judicial opinion in the House of Lords than it did in the Court of Appeal—though the result was to affirm the latter's decision. It is a case of considerable importance. The facts were briefly that a lorry driver, employed by a company, took his father with him as mate. In backing the lorry he injured his father, who, in an action against the company on the ground of their vicarious liability, recovered £1,600 damages in respect of his son's negligent act. The company then brought an action (at the instigation of their insurers) against the driver claiming that, as joint tortfeasor, it was entitled (1) to a contribution from him under the provisions of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, or (2) to damages for breach of an implied term in his contract of service that he would use reasonable skill and care in driving. The House held unanimously that the driver was under a contractual obligation of care to his employers in the performance of his duty as a driver. But it was only by a majority of three to two that they were prepared to go on and say that the company were therefore entitled to recover damages for breach of that contractual obligation. Both Lord Radcliffe and Lord Somervell of Harrow, who dissented, took the same view as Denning L.J. in the Court of Appeal, namely, that it is an implied term of such a contract of employment as this that the driver was protected by insurance from any third party liability arising from his driving and, accordingly, neither the employer nor his insurers could sue the driver in respect of that liability. Lord Radcliffe pointed to the anomalies which appear otherwise to arise from the insurance position. If an accident takes place through negligence, the person injured can sue either employer or employed or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has brought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is apparently much worse and the position of the insurance company apparently much better. For now the latter can indemnify itself for money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is, in the end, the one who foots the bill.

But the difficulty is to read such an implied term into the contract of service. There seems now to be no doubt that the question of insurance, normally irrelevant in an action of damages, can be made relevant if there is an express or implied term to the contrary in the contract of service. But the majority of judges regarded the proposed implied term or terms (which counsel incidentally found great difficulty in trying to formulate) too far-fetched. They held that there was no implied term that the driver was entitled to be indemnified by the company, either if they were in fact insured or were required to be insured under the Road Traffic Act, 1930, or if, as reasonable and prudent employers, they ought to have been insured.

Viscount Simonds and Lord Morton of Henryton considered the company were also entitled to recover contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935.

W. A. E.

ANIMALS FERAE NATURAE—Docile elephant attacked by dog—Liability for damage caused by elephant.

Midgets and elephants are a strange combination in a law case but so it was in *Behrens and Another* v. *Bertram Mills Circus, Ltd.* [1957] 2 W.L.R. 404. The plaintiffs, husband and wife, were both midgets and were on exhibition in a booth in the funfair adjoining the defenders' circus at Olympia, which the plaintiffs and their manager occupied under licence from the defendants. Tame female Burmese elephants were kept nearby for performance in the circus ring and one day, when they were being escorted alongside the booth, the plaintiffs' manager's dog ran out barking at one of them, who turned on it, followed by some of the other elephants, and trampled down the booth, seriously injuring the plaintiff's wife. The case raised a great variety of pleas and defences but its chief importance lies in its emphasis of the extreme rigidity of the *scienter* rule.

This rule requires the harmfulness of the offending animal to be judged, not by reference to its particular training and habits, but by reference to the general habits of the species to which it belongs. The law ignores the world of difference between the wild elephant in the jungle and the trained elephant in the circus. As a matter of law an elephant is an animal *ferae naturae*: *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (1890) 25 Q.B.D. 258. Accordingly the trial judge had to assess the defendants' liability in the same way as if they had let loose a wild elephant into the funfair, albeit (in Devlin J.'s words) " the elephant Bullu is in fact no more dangerous than a cow; she reacted in the same way as a cow would do to the irritation of a small dog."

It was contended *inter alia* for the defendants that the rule of absolute liability applied only when an animal was acting savagely and attacking human beings, whereas in the present case Bullu was not acting viciously but out of fright. The trial judge considered Professor Glanville Williams' view expressed in his book on liability for animals that the damage caused must in some way have been intended by the animal, that its benevolence or *mens rea* was relevant and that at least in the case of harmless animals the rule was that the injury must be the result of a vicious propensity. But he did not consider this rule to apply in the case of *ferae naturae* and thought certain practical considerations seemed to demand they be treated differently. It might be reasonable to hold the owner of a biting dog responsible for everything it did; but it might also be unreasonable to limit the liability for a tiger. As the learned judge observed: " If a person wakes up in the middle of the night and finds an escaping tiger on top of his bed and suffers a heart attack, it would be nothing to the point that the intentions of the tiger were quite amiable." With great respect one can just see the smile on the face of the tiger!

The case emphasises the need for legislative reform of this branch of the law.

W. A. E.

The decision of the House of Lords in *Vine* v. *National Dock Labour Board* [1957] 2 W.L.R. 106 is important for emphasising that only rarely can a quasi-judicial function be delegated. The court must take into account the importance of the duty and the people who delegate in deciding whether such delegation can validly be made.

QUASI-JUDICIAL TRIBUNAL—Control by courts —Unauthorised delegation of functions by local board.

In this case the plaintiff, a dock labourer employed by the defendants, the National Dock Labour Board, under the scheme set up by the Dock Workers (Regulation of Employment) Order, 1947, was allocated work with a stevedoring company but failed to report to them. A complaint lodged with the defendants was heard by a disciplinary committee appointed by the local dock labour board, who upheld the complaint and, purporting to act under clause 16 (2) (*c*) of the Order, gave the plaintiff notice to terminate his employment with the defendants. He thereafter raised an action against the defendants claiming damages for wrongful dismissal and a declaration that his purported dismissal was *ultra vires*. The House of Lords held that the plaintiff's dismissal was invalid, since the local dock labour board had no power under the scheme to delegate to a disciplinary committee their disciplinary and quasi-judicial powers, under which a man might be entirely excluded from the employment of a dock worker. Differing from the Court of Appeal they were also prepared to give a declaratory judgment as well as damages, which the judge of first instance had assessed at £250.

W. A. E.

3. PRIVY COUNCIL CASES

Sheikh Brothers, Ltd. v. *Arnold Julius Ochsner and Another* ([1957] 2 W.L.R. 254), an appeal from the Court of Appeal for Eastern Africa, sitting at Nairobi, dismisssing an appeal by the present appellants and affirming a judgment of the Supreme Court of Kenya, raised questions as to the effect of sections 20 and 56 of the Indian Contract Act, 1872, on a licence agreement

CONTRACT: Performance impossible: void.

made between the appellants and the first respondent on December 9, 1950. The agreement, having recited that the appellants were the lessees of an estate part of which included about 5,000 acres planted with mature sisal (the sisal area), granted the licensee (the first respondent) a licence to cut, decorticate, process and manufacture all sisal then or thereafter growing on the sisal area. By clause 3 the licensee undertook, *inter alia*, to deliver all sisal fibre which he produced on the premises to the company, and, as from April 1, 1951, to manufacture and deliver sisal fibre in average minimum quantities of fifty tons a month. The first respondent, in May, 1951, assigned to the second respondent his rights, and obligations under the licence agreement with effect from January 1, 1951. By the terms of that agreement the respondents, or one of them, carried on the cutting and manufacture of sisal until January 31, 1952, when the appellants, at the request of the second respondent, and without prejudice to the rights and remedies of the appellants under the agreement, resumed possession of the land. On November 27, 1952, the appellants and respondents signed an agreement of submission of disputes between them to two arbitrators, the preliminary points for decision being whether the licence agreement was void either under section 20 of the Indian Contract Act, 1872, because of mutual mistake, or under section 56 because of impossibility. The mutual mistake alleged was that both parties believed, contrary to the fact, that the leaf potential of the sisal area would be sufficient to permit the manufacture and delivery of the minimum quantities of fifty tons a month throughout the term of the licence. It was also clear that the impossibility alleged was that the leaf potential of the sisal area made it impossible to produce the minimum quantities over the said term.

By section 20 of the Act of 1872: "Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Section 56 provided: "An agreement to do an act impossible in itself is void," and by paragraph 3 of that section: "When one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible . . . , such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise." The Court of Appeal for Eastern Africa held that the licence agreement was entered into under a mutual mistake as to a matter of fact essential to the agreement and was accordingly void under section 20, but that it was also void under section 56 since the agreement contained an obligation to do an act impossible in itself. They held, however, that, as the agreement was void under section 20, the appellants could not recover compensation under the third paragraph of section 56 although the conditions required by that paragraph to found a claim for compensation undoubtedly existed.

Before the Board two points were argued on behalf of the appellants: (1) that the mistake was not as to a matter of fact *essential* to the agreement; (2) that, even if the licence was void under section 20, section 56 was also applicable and therefore, on the finding of fact by the arbitrators that the appellants did not know, but that the respondents with reasonable diligence might have known, of the impossibility, compensation was payable under the third paragraph of that section. In their Lordships' opinion the licence agreement provided for something in the nature of a joint adventure and was entered into on the basis that the sisal area was capable of producing sisal over the period of the agreement at the average rate of fifty tons a month. It was the very basis of the contract that the sisal area should be capable of producing an average of fifty tons a month throughout the term of the licence. It followed that the mistake was as to a matter of fact essential to the agreement. [*Bell* v. *Lever Bros., Ltd.* ([1932] A.C. 161; 48 T.L.R. 133) applied.] On the second point the respondents did not argue that the facts did not establish an agreement to do an act impossible in itself, so that it was unnecessary to consider the meaning of the phrase "an act impossible *in itself*." The respondents took the point that the third paragraph in section 56 applied only where an agreement otherwise valid was rendered void by impossibility of performance—an argument which was well-founded. The Act was divided into chapters. Chapter II, into which section 20 fell, was headed: "Of contracts, voidable contracts and void agreements." Section 10, the first section of the chapter, provided that all agreements were contracts if they were made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and were not thereby expressly declared void. Section 14 provided that consent was free when it was not caused by, *inter alia*, " 5, mistake subject to the provisions of section 20." Mutual mistake within section 20 having been found to exist at the date of the licence agreement, it necessarily followed that that agreement was not a contract within section 10. Neither could it be an agreement enforceable by law. Therefore, quite apart from section 56, it was a void agreement: see section 2 (*c*). True, it fell within the language of the first paragraph of section 56, but that section came under Chapter IV, which concerned the performance and not the formation of contracts. It seemed to their Lordships reasonable to construe section 56 as applying only to agreements which, apart from questions of performance, were enforceable agreements.

It was suggested that there might be repugnancy between sections 20 and 56, the third paragraph of section 56 covering a case of mutual mistake where neither the promisor nor promisee knew of the impossibility, but it was found that the promisor might with reasonable diligence have known of it. If in such a case, the argument went on, compensation was not payable, there must be repugnancy between sections 20 and 56 and therefore the latter section must prevail (see Maxwell on the *Interpretation of Statutes*, 10th ed., p. 162). Their Lordships had already given one reason for holding that no repugnancy existed—namely, that section 56 only applied where there was, apart from any question of performance, an enforceable agreement. The third paragraph itself contained reason for rejecting the argument. There were two possibilities under that paragraph: (1) A., the promisor, knew of impossibility, B., the promisee, did not; then no question of mutual mistake could arise. (2) A. did not know, but with reasonable diligence ought to have known, of the impossibility. B. did not know of it. Then, said the appellants, there was mutual mistake. That was literally true, but here also the words " or with reasonable diligence might have known " implied a set of circumstances in which the promisor was in a different position from the promisee. In other words, the case was to be treated as one of unilateral not mutual mistake. The appeal was accordingly dismissed.

HUSBAND AND WIFE: Marriage potentially polygamous: English rule as to conspiracy.

Laila Jhina Mawji and Another v. *The Queen* ([1957] 2 W.L.R. 277) was an appeal by special leave from a judgment of the Court of Appeal for Eastern Africa affirming a judgment of the High Court of Tanganyika which had dismissed the appellants' appeals against their convictions in the District Court of Dar es Salaam on two counts. The first count charged them with conspiracy to obstruct, prevent, pervert or defeat the course of justice, contrary to section 110 (*a*) of the Penal Code of Tanganyika, by concealing a wall clock which they well knew was required for the purpose of an inquiry into a criminal offence; the second count charged them with retaining property feloniously stolen or obtained, contrary to section 311 (1) of the Penal Code. The present appeal was, by the Order in Council granting special leave, limited to the conspiracy count. The appellants were lawfully married in accordance with the rules of the Khoja Sect, a sub-sect of the Shia Mohammedans, and were living together in a common matrimonial home under conditions in all respects similar to a monogamous union. At the end of the evidence for the prosecution it was submitted for the defence that the accused, being husband and wife, could not be guilty of conspiracy because the rule of English criminal law to that effect applied to the appellants. The Board stated that that raised two issues: (1) whether under provisions of the law of Tanganyika that rule was applicable in Tanganyika, and (2) whether, if it was applicable, it applied to the appellants whose marriage was potentially polygamous. The magistrate decided that the rule of English law was applicable in Tanganyika, but that it did not apply to a potentially polygamous marriage. The High Court and the Court of Appeal were of the same opinion. The Court of Appeal quashed the female appellant's conviction on the second count. Before the Board the respondent submitted that the courts below were wrong on the first point (the decision on which was in the appellants' favour).

Section 110 (*a*) of the Tanganyika Penal Code provided: "Any person commits a misdemeanour who conspires with any other person to . . . do anything to obstruct, prevent, pervert or defeat the course of justice." By section 4 of the Code: "This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith." The question was whether the rule was incorporated into section 110 (*a*) by section 4. It was submitted for the respondent that, in applying section 4, substantive law must be distinguished from "interpretation" and "meaning." It might be difficult to define the limits of section 4. The contrast between substantive law and interpretation did not seem to assist. The most obvious form of interpretation would extend or restrict the application of words and thereby affect the substantive law. The Board were of opinion that the rule was incorporated into the provisions of section 110 (*a*).

They accepted the submission of the respondent that the rule was an example of the fiction that husband and wife were regarded for certain purposes, of which the present was one, as in law one person. In the criminal law of Tanganyika the words husband and wife, if unqualified, were not restricted to monogamous unions. If it was desired to deal with monogamous as distinct from other marriages express words were used: see section 155 of the Criminal Procedure Code. It was clear that the marriages primarily contemplated by the rule in England were monogamous marriages, but, the rule being now part of the criminal law of Tanganyika, the Board considered that it applied to any husband and wife of a marriage valid by the law of Tanganyika. They did not accept the submission for the respondent that the rule could not apply to the appellants unless it would apply to them if the alleged conspiracy had taken place in this country. Potentially polygamous marriages had been recognised for various purposes in this country: *Baindail* v. *Baindail* ([1946] P. 122). It might be that such a marriage would be recognised for the purpose of this rule, but their Lordships expressed no opinion on that point. The rule plainly applied here at least to marriages recognised as fully valid, and it should therefore apply in Tanganyika to marriages recognised as fully valid there. It was not suggested that the appellants' marriage was not in that category. The appeal was accordingly allowed and the convictions on the first count quashed and the sentences set aside.

CRIMINAL LAW: Jurisdiction of Court of Appeal to order retrial.

The question whether the Court of Criminal Appeal in England ought to be given the power to order a retrial where it thinks that that is the appropriate course has often been discussed. In *Alfred Granville Ross* v. *The Queen* ([1957] 2 W.L.R. 307), an appeal by special leave from a judgment of the Court of Appeal for Eastern Africa, quashing the conviction of the appellant in the Supreme Court of Kenya of offences against the Income Tax and Excess Profits Ordinances, and ordering that he be retried, raised the question whether the Court of Appeal had jurisdiction to order a retrial in a criminal case. Section 16 (1) of the East African Court of Appeal Order in Council, 1950, provided: "The court shall have jurisdiction to hear and determine such appeals from judgments of courts of the territories . . . and, subject as aforesaid, for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the court shall have the power, authority and jurisdiction vested in the court from which the appeal is brought." Section 18 (1) provided for the making of Rules of Court for regulating the practice and procedure of the Court of Appeal in appeals to that court. Rule 41 (1) of those rules, provided that at the hearing of an appeal the court had power to confirm, reverse or vary the decision of the trial court, or might order a retrial or might remit the matter with the opinion of the court thereon to the trial court, or might make such other order in the matter as might seem just, and might by such order exercise any power which the trial court might have ordered. Section 354 of the Criminal Procedure Code of Kenya gave the Supreme Court of Kenya (from which the present appeal was brought) power in an appeal from a conviction to reverse the finding and sentence or acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction or commit him for trial.

The argument on behalf of the appellant assumed that, apart from the power conferred by rule 41, the court had no jurisdiction to order a retrial in criminal matters. It was contended that the only power to make Rules of Court under section 18 of the Order in Council was for the purpose of " regulating the practice and procedure . . . in appeals to the court," that the conferring of a power to direct a retrial in a criminal case was not a matter of practice or procedure, and that rule 41, so far as it purported to confer a power to order a new trial was *ultra vires.* The Board referred to section 354 of the Criminal Procedure Code of Kenya and said that section 378 of the same Code provided for an appeal to the Court of Appeal for Eastern Africa of a person convicted on a trial held by the Supreme Court of Kenya. It appeared to be a logical and consistent scheme that the same power of ordering a retrial should be given to the ultimate Court of Appeal as to the court from which the appeal was brought. That was what the last words of section 16 (1) of the Order in Council provided.

But the Board did not think it satisfactory to base their decision solely on that ground, and proceeded to examine the validity of the plea that rule 41 was *ultra vires* in that it was not a rule for regulating " practice and procedure " to which the rule-making power was confined. The meaning of the words " practice and procedure " in section 18 of the Order in Council of 1950 was not to be ascertained either by treating them as if that Order in Council was the first for those territories in which they appeared. On the contrary they had half a century behind them. Though there was high authority for saying that a right of appeal was itself to be regarded not as a matter of practice and procedure but as a substantive right (see *e.g.*, *Colonial Sugar Refining Co., Ltd.* v. *Irving* ([1905] A.C. 369, at p. 372) and *Newman* v. *Klausner* ([1922] 1 K.B. 228, at p. 231)), yet when the right of appeal had been granted there seemed little difficulty in regarding the power to order a new trial as part of the practice and procedure of the court.

The Board referred to the history of the jurisdiction of the Court of Appeal, the enactments establishing it and the rules regulating its procedure so that it might become abundantly clear that, whatever interpretation might be put on the words " practice and procedure " in isolation, it had been the consistent policy of the legislative authority to give the court power to order a retrial both in civil and criminal cases. Their Lordships entertained no doubt that in appeals from the courts of those territories to which the Order in Council applied there were very good reasons why such a power should be given, and it appeared to them that it was not only open to them but incumbent on them to give the words in their context the wider meaning which would bring rule 41 within their scope. For that reason, as well as that on which the respondent relied under the last words of section 16 (1) of the Order in Council, their Lordships were of opinion that the court had jurisdiction to make the order from which the appeal was brought. The appeal was accordingly dismissed.

4. THE FIRST REPORT OF THE LAW REFORM COMMITTEE FOR SCOTLAND

The First Report of the Law Reform Committee for Scotland has now been presented to Parliament.[1] The Committee had been invited by the Lord Advocate to consider " the law relating to (a) the liability of an occupier of land or other property to persons suffering injury while on the property and (b) the obligations of a lessor towards third parties invited, or allowed, by the lessee to be on the subjects let." Its Report in substance recommends as to (a) the abolition of the categories of invitee, licensee and trespasser introduced into Scots law by *Dumbreck* v. *Addie and Sons, Ltd.*,[2] and as to (b) the abolition of the rule in *Cameron* v. *Young*.[3] In both cases it is proposed that the injured person should have an action based upon the ordinary principles of *culpa*—that is to say the obligation to take that care which the circumstances require from a reasonable man.[4]

It is obvious from the Report, if it were not already well known, how generously the distinguished Members of the Committee and, not least, their Chairman, Lord Walker, have given of their time and wisdom to the service of Scots law. They may be assured of the profession's gratitude both for the good work which they have already accomplished, evidenced by the present

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[1] Cmnd. 88, 1957.

[2] 1929 S.C. (H.L.) 51; 1929 S.L.T. 242.

[3] 1908 S.C. (H.L.) 7; 15 S.L.T. 976.

[4] Paragraph 29 (*b*).

Report, and for their continuing labours in a difficult and time-consuming task. The Committee's first Report is a concise and lucid analysis of a confusing subject.

The same questions had been examined previously by the corresponding English Committee.[5] Its recommendations formed the basis of the Occupiers' Liability Bill, which received an unopposed Second Reading in the Commons on March 6. The welcome given by both Parties in the Commons to the English Bill raises the hope that the recommendations of the Scottish Committee will be translated into parliamentary action at a reasonably early date.

A lessor's liability to persons permitted to enter the subjects let or entering them by right has been governed since 1908 by the rule affirmed by the House of Lords in the English case of *Cavalier* v. *Pope* [6] and applied to Scotland in the case of *Cameron* v. *Young*.[7] Hardly a good word has been said for either of these decisions in recent years. The rule was criticised by the English Leasehold Committee in 1956 and it does not need the striking facts of *Davis* v. *Foots* [8] to demonstrate its injustice. The view of the Scottish Committee is that liability should be confined to the situation where the lessor is bound by contract with the lessee, or by statute, to keep the subjects in repair, but that in this situation the person injured should have an action based on the ordinary principles of *culpa*. The English Committee's recommendation was that the person injured should have the same right of action against the landlord as he would have had if he himself had been tenant. The Occupiers' Liability Bill drops this quasi-contractual solution and places the landlord in the position of an occupier *quoad* liability to the person injured, but only where the landlord is under a duty to repair and the default is such as to be actionable at the suit of the occupier. The Scottish suggestion is a simpler and, it would seem, preferable one.

While the Scottish Committee recommends the abolition of all three categories of invitee, licensee and trespasser, its English colleagues propose merely that a distinction should no longer be made between invitees and licensees and that the occupier of premises should be under a "common duty of care" to every person coming upon the premises at his invitation or with his permission, express or implied. But even in this limited domain the Scottish Committee is bolder than the English, since the latter explains and qualifies in various ways its basic rule of liability. It is in regard, however, to the position of trespassers that the two Reports are in greatest conflict. The English proposal is that the existing law as to trespassers should be retained.[9] On this point there was some disagreement among the members of the Scottish Committee, a minority desiring the existing law relating to trespassers to be retained. In many cases the same result would be achieved whichever solution is adopted, because normally an occupier will have "no reason to suppose that people are invading his property behind his back"[10] and, it would follow, owe no duty to them. It would be otherwise, however, where the trespasser is known to be present. It would seem that the majority contemplate that in such cases the occupier may be liable on the general principle of *culpa*. Unfortunately, neither the majority nor the minority give any reasons for their respective opinions. It may be assumed that the majority were fortified in their opinion by the consideration that in the common law of Scotland a civil wrong is not necessarily committed by the mere fact of entry on the lands of another without that other's permission. But is this, by itself, a sufficient reason for proposing a change in the law?

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[5] Cmd. 9305/1954.
[6] [1906] A.C. 428.
[7] *Supra*.
[8] [1940] 1 K.B. 116.

This issue, it is thought, is a crucial one. The fundamental justification for any change in the law surely must be this, that the existing law works injustice or at any rate does not protect adequately interests which are deserving of protection. In the field of law under consideration such justification would not have been very far to seek. The Report, however, ignores it and recommends the alteration of the existing rules merely because they are not "consistent with the fundamental principles of the Scottish law of delict," or because they have introduced "narrow, rigid and ambiguous distinctions," or because they are illogical. It is true that the Committee is one for *law* reform and its major task to correct anomalies in the law; but it is equally true that the law is not meant to be a purely abstract system. The Committee is directed " to report whether any changes in the law are desirable," and the term " desirable " is unqualified. However carefully in its private deliberations the Committee may have considered and evaluated the social interests involved in the branch of the law brought to its notice, the fact that it did so is not apparent from the Report. The Committee, indeed, adopts by reference the criticisms of the present law on invitees, licensees and trespassers contained in the English Report, which does contain some discussion of what social interests ought to be protected in this domain and of how they may best be protected. But it hardly becomes a Committee which considers that the legislation designed to give effect to its own reforms " should be drafted independently of any English statute " to leave the real justification for its own recommendations to be sought in a report of an English Law Reform Committee. The writer insists on this point because he is convinced of the importance of the Committee's work. The Mackintosh Report on the Law of Succession rightly points out that in Scotland " law reform has usually proceeded from within the legal profession rather than from without it."[11] It is, therefore, all the more important that the justification for the proposals of the Law Reform Committee should be presented in a manner calculated to secure their acceptance outside the narrow circle of Scots lawyers. The justification should be founded upon practical desirability, as well as upon *elegantia juris*.

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[9] English Report, para. 80.

[10] Scottish Report, para. 5, citing Lord President Clyde in *Dumbreck* v. *Addie & Sons, Ltd.*, 1928 S.C. at p. 554.

In the present instance, however, this lack of justification should not, and it is hoped will not, prevent the implementation of the Report. The practical justification exists, even although it is not presented. The Committee's proposals are simple and rational and deserve the early attention of the legislature.

A. E. ANTON.

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[11] Cmd. 8144/1951, p. 10.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate, Sheriff-Substitute of the Lothians and Peebles

THE COURTS AND EXECUTIVE DISCRETION

Even in those cases which may be considered as showing the high-water mark of judicial reluctance to control executive powers, like *Liversidge* v. *Anderson* [1942] A.C. 206, *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* [1943] 2 All E.R. 546, or *Pollok School Co., Ltd.* v. *Glasgow Town Clerk*, 1946 S.C. 373, 1947 S.C. 605, the courts have insisted upon one requirement at least, namely that the power must have been exercised in good faith. Thus in the latter case, while the contention of the Secretary of State that he had complete discretion, subject only to Parliamentary control, to requisition property under Defence Regulation 51 was upheld, it was admitted that his discretion could be challenged on the ground of bad faith And in fact averments of bad faith on the part of an authority to which he had delegated his functions were allowed to go to proof. In general, though where an Act of Parliament is concerned inquiry into the good faith of the promoters of a Bill will not be made (*Lee* v. *Bude & Torrington Ry.* (1871) L.R. 6 C.P. 576), it appears that the *bona fides* of all executive and administrative proceedings, including subordinate legislation, is subject to judicial examination. It might be expected therefore that the courts would be very slow to interpret a statute in such a way as to exclude the possibility of challenging executive acts authorised by it on the ground of bad faith. Nevertheless in *Smith* v. *East Elloe Rural District Council* [1956] 1 All E.R. 855 the House of Lords decided by a majority of three to two that the validity of a compulsory purchase order made under the Acquisition of Land (Authorisation Procedure) Act, 1946, cannot be impugned on the ground that it has been made or confirmed in bad faith, since Schedule I provides that (subject to a limited right of challenge within six weeks) a compulsory purchase order shall not be questioned in any legal proceedings whatsoever. This provision was held, by the majority consisting of Viscount Simonds, Lord Morton and Lord Radcliffe, to be absolute in its terms, so as to preclude any inquiry by the courts into the *bona fides* of the authority which had made or confirmed the order. The minority, consisting of Lords Reid and Somervell, rejected the literal interpretation of the provision and were of opinion that Parliament could not have intended by the use of general words to depart from fundamental principles of law.

Surprise is expressed in an editorial note in the *Law Quarterly Review* for October, 1956 (72 L.Q.R. p. 460) that the *East Elloe* case has given rise to so much public concern, seeing that only the construction of the particular words of a statutory provision was involved, and not any serious constitutional question or general principle. But this view itself seems rather surprising, for many of the leading cases in public law have turned on the interpretation of a statute, and the question whether the courts can or cannot exercise control over executive acts when bad faith is alleged is surely a matter of general principle. Viscount Simonds, indeed, said that the issue was one of "great public importance" and Lord Morton spoke to the same effect. A similar type of provision as that which came before the House of Lords in this case occurs also in other statutes, for example, the New Towns Act, 1946, and the Town and Country Planning Act, 1947.

Mr. S. A. de Smith, writing in *Public Law* for Autumn, 1956 (pp. 233 *et seq*), is of opinion that the interpretation given to the statute under consideration may have been a correct reflection of the intentions of Parliament, or at least of the draftsman. But he thinks it obviously unsatisfactory that the six weeks' period for challenging an order should have to be rigidly enforced in every case. A person aggrieved by an order affecting his property may well have no opportunity of discovering the circumstances that taint it with invalidity until after the statutory period has elapsed. The courts should have a discretion to extend the period in case of hardship. It is unlikely, as he points out, that such a discretion would have been exercised in the *East Elloe* case, since the plaintiff did not institute proceedings until six years after the event and in the meantime houses had been built on the land. He is also worried by dicta in the case to the effect that a challenge cannot be made even within the six weeks' period on the ground of bad faith, or for any other reason than breach of procedural requirements or excess of power in the narrowest sense.

In a previous article (18 M.L.R. 571) Mr. de Smith shows that the courts have been jealous of attempts to deprive them of jurisdiction by finality provisions of various kinds. Statutory words such as "final and conclusive" and "final and not subject to appeal to any court" have not precluded the courts from exercising their supervisory powers; and where the right to certiorari has been expressly taken away by statute the English courts have persistently declined to construe the words of the statute literally so as to deprive a superior court of the ability to correct a tribunal of limited jurisdiction if it lacks or exceeds jurisdiction or if a conviction or order has been procured by fraud or collusion. The Committee on Ministers' Powers (Cmd. 4060) objected strongly to finality provisions, and recommended that the use of clauses designed to exclude the jurisdiction of the courts to inquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except on special grounds explicitly stated. Even so, a period of challenge of at least three months, preferably six months, should be allowed (p. 65). Like most of the other recommendations of the Committee, this has been, if not totally disregarded, at any rate received by Parliament with moderate respect.

In the article just mentioned, written before the decision of the House of Lords in the *East Elloe* case, Mr. de Smith expresses the opinion that the provision in the National Service Act, 1948, by which certain determinations of the Minister and others are not to be called in question in any court of law (s. 15 (2)), does not oust the supervisory jurisdiction of the courts. It now appears, however, that an allegation of bad faith cannot be inquired into where this provision, or a formula similar to it, is inserted in a statute. And it seems doubtful whether a determination could be reviewed on any other ground, unless perhaps for obvious jurisdictional error.

Bad faith was alleged in the *East Elloe* case against the Ministry concerned as well as against the local authority which made the compulsory purchase order complained of. But, apart from a statutory provision barring judicial review, it will plainly be difficult to establish bad faith on the part of a local authority or other public body, and still more difficult on the part of a government department, owing among other things to the refusal of departments to make official files accessible, and their readiness to object on the ground of injury to the public interest to the production of documents. In spite of the insistence of courts that the discretionary powers of Ministers must be exercised in good faith, it is doubtful how far any real limitation of those powers is implied. As in the cases of *Liversidge* v. *Anderson* and *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87 (the Stevenage case), public concern over the *East Elloe* decision has arisen not so much from the merits of the case as from the tendency which some people think they see in the highest court of the country to give up any attempt to control the acts of the executive. If the courts will not interfere where it is alleged that officials have been guilty of dishonesty, will they not certainly decline to interfere to stop less obnoxious abuses of power?

It is now the rule rather than the exception, as Mr. de Smith says, to confer upon public authorities powers which are exercisable when they are " satisfied," or some such form of words, that a certain state of affairs exists, or which enable them to take action as they " think fit " in relation to a particular subject-matter. And it has become the exception rather than the rule for the courts to set effective limits to the powers so conferred. It is this matter of executive discretion, whether because of the wide scope of the discretionary powers granted or because of the express exclusion of judicial control, which is now becoming recognised as crucial rather than questions of administrative jurisdiction and of judicial review of the findings of administrative tribunals. Thus Professor Hamson in his valuable study of the French Conseil d'Etat, *Executive Discretion and Judicial Control* (Hamlyn Lectures, 1954) concentrates his attention on what he regards as the special and characteristic aspect of the Conseil d'Etat's activity, its control over the executive " acting in its most executive capacity." He shows that a French citizen who is aggrieved by almost any administrative act or decision adversely affecting him may bring a complaint by an informal and inexpensive procedure to the attention of the Conseil d'Etat. If a prima facie case is made out, the Minister concerned, however high a degree of discretion is vested in him to decide the particular matter, is bound to justify himself by providing a sufficient answer to the complaint. In the event of his failure to do so to the satisfaction of the Conseil d'Etat, the decision will be quashed and the Minister required to come to a new decision. The Conseil d'Etat is not, it appears, by any means easily satisfied. It will decide for itself what constitutes an adequate answer and whether the ostensible reason given is the true one. The departmental decision will be quashed not merely on the ground that it is *ultra vires*, or involves bad faith or abuse of power, that is to say exercise of a power for a purpose other than that for which it was granted, but also on the ground that it is contrary to proper administrative principles, as interpreted by the Conseil d'Etat. Moreover, although legislative supremacy is "in theory" respected, it is practically impossible for the jurisdiction of the Conseil d'Etat to be ousted as courts in this country have been prevented from examining administrative decisions by formulae like that contained in the Acquisition of Land Act, 1946.

There cannot be any doubt that so far as civil administration is concerned individual rights, whether rights of positive law or the wider and vaguer claims to protection against arbitrary acts which are generally recognised, rest on a firmer judicial foundation in France than with us. At the same time it is clear that we cannot simply set up an anglicised Conseil d'Etat on British soil. The conditions in which it flourishes in France are too alien from those that obtain here, in particular the existence of two separate legal systems, governing disputes between private persons on the one hand and disputes involving public authorities on the other. We can, however, certainly learn from the French example, even if we cannot directly imitate it. With regard to administrative tribunals, the problems of reform, for which there is plenty of room, are complicated without probably requiring any extraordinary remedies. The Franks Committee will perhaps provide a solution, or point the way towards one. It is harder to see what the remedies should be in the case of administrative decisions which are wholly or mainly discretionary. Who, asks Professor Hamson, is to discharge this residuary function, as he calls it, discharged by the Conseil d'Etat in France? He thinks that it would not be easy to institute a special tribunal for the purpose, and that the executive itself, acting on its own initiative without legislation, should satisfy the need by some internal process, parallel to that by which the Conseil d'Etat has evolved.

Professor Hamson is surely rather optimistic in supposing that the executive in this country will ever voluntarily contemplate such a measure. Hardly anything seems less probable, if we may judge from the manner in which the recommendations of the Committee on Ministers' Powers have been carried into effect, or the reluctance to allow subjects to sue the Crown. A tribunal of this kind apparently envisaged by Professor Hamson, assuming that it bore any resemblance at all in its functions to the Conseil d'Etat, would not merely have to inquire into the reason for administrative decisions against which a complaint was made, but would have to allow the complaining party to participate in the inquiry. It is not difficult to imagine the sort of opposition which officials would make to the idea of opening their abundant and precious files for inspection by persons with a grievance against them. Very great pressure from outside would, it seems likely, be necessary to induce the civil service to agree to such a repugnant proposal.

The power of the executive is closely related to the principle of ministerial responsibility, according to which the acts of every civil servant are regarded as the acts of a minister, and to its corollary, the rule of Parliamentary practice by which criticism of the administration must be directed against, not the official who is actually responsible, but the Minister who is often, or usually, only a mouthpiece. It is a convenient principle both for civil servants and for politicians, although not so convenient for other people. To the civil servant the politician is indispensable to explain to the public what the civil service is doing and why, to let officials know what, in Sir William Harcourt's phrase, the public will not stand, to protect them from criticism, informed or uninformed, and to take the blame for everything that goes wrong. In return the politician gets what he wants, namely deference, publicity, ultimate control of policy, and the credit for whatever turns out successful. It is a consequence of the rule of Ministerial responsibility that, while in theory the courts apply the law to civil servants in the same way as to private persons, in practice the only restraint upon them in the exercise of their official duties is that exercised by their superiors. An iron curtain, or perhaps we should rather say a substantial and opaque veil, of secrecy, anonymity and irresponsibility is interposed between the public and the administration. The Minister at the head of a department may have to explain and justify the acts of his subordinates in Parliament, but this is as a rule small consolation to an individual with a grievance, for Parliament is both too busy and too much under the influence of the executive to pay attention, except in isolated instances, to individual complaints.

It is a very different matter if there is a large number of individuals who have the same complaint. So far as groups of individuals are concerned, both the executive and Parliament are not merely not too strong but on the contrary much too weak and open to pressure, not to say blackmail. Indeed the weakness of the governments of democratic countries in the face of group and sectional interests is the chief domestic political problem of the present day. Governments, however, have little fear of individuals, although cases involving individual rights sometimes arouse considerable Parliamentary clamour provided that the individual has enough personal influence or has attracted sufficient publicity to himself for one reason or another. We need hardly observe that it is not always the most meritorious claims that have the loudest voices. Whether it is a matter of the undue susceptibility of governments to group pressures or their disregard of individual grievances, the question is how to substitute the rule of law for the rule of politics. The principle of Ministerial responsibility is designed to maintain the rule of politics. On the one hand, owing to the theory, to a large extent fictitious, that civil servants only carry out the instructions of Ministers and as regards policy advise without initiating or deciding, all important issues are transferred to the Parliamentary stage and involved with the party political conflict. Party warfare, however, is the means which sectional interests use to further their own advantage at the expense of the public in general. On the other hand, an individual who is subjected to oppressive or arbitrary treatment at the hands of officials, a thing which must happen occasionally however high the standards of the civil service, has no hope of redress except by applying to Parliament. As the unfortunate Minister of Agriculture at the time of the Crichel Down case found, politicians may pay dearly for the faults of other people. They cannot be expected to take all the blame for the misdeeds or errors of their officials unless they are given complete authority over them. Any system, however, by which the veil that protects officials can be regularly penetrated and the workings of the machinery behind disclosed will not fail to diminish the responsibility of the political heads of public departments and to increase the responsibility of their subordinates, since it will reveal the true nature of administrative processes and the limited extent to which the country is really ruled by politicians rather than civil servants.

It seems likely, therefore, that not only would legislation be required to give private persons the right to challenge decisions taken by the executive in the exercise of discretionary powers, but there would be considerable opposition to such legislation. And no doubt it would be a delicate matter to probe the secrets of government departments without seriously affecting their efficiency. It is necessary so far as possible to avoid creating friction between civil servants and judges, which might end in a conflict between Parliament and the courts. The Conseil d'Etat, including its judicial division, is an expert body of officials trained in administration and enjoying the highest prestige in the eyes of French civil servants. The ordinary courts of law in this country, or even a special court, containing laymen and lawyers, might hardly be in a position to weigh the arguments for and against a particular administrative decision properly, because it did not possess the expert knowledge or had not all the material available to enable it to scrutinise adequately the reasons given for the decision. Moreover, for this purpose the ordinary process of litigation, by which the parties are left to prepare and present the case in the manner they think fit and the court merely decides in favour of one side or the other, would hardly be appropriate. Perhaps what is needed is a body combining investigatory and judicial powers, or perhaps, in addition to a special court, there would have to be a commission, somewhat after the style of the Monopolies Commission, to carry out the preliminary functions of investigation and to decide whether a prima facie case had been made out.

It may be that there are other purposes which a commission of this sort could fulfil. For example, in *Glasgow Corporation* v. *Central Land Board*, 1956 S.L.T. 41, the House of Lords affirmed and emphasised the inherent power of the courts in Scotland to override an objection by a Minister to the production of a document on the ground of injury to the public interest. The dictum of Lord Simon in *Duncan* v. *Cammell Laird & Co.*, to the effect that in Scotland, as in England, such an objection must be upheld was disapproved. The overriding power of the courts, Lord Normand said, "is not a phantom power," and Lord Radcliffe thought that it would not be "a matter for surprise if some future judge in Scotland finds himself obliged to disregard the Crown's objection and to hold that disclosure can do much less injury to the interests of the public than non-production of a particular document may do to that other public interest which is represented by the cause of justice." In spite of this encouragement, the courts in Scotland will perhaps find it difficult, as they have in the past, to make up their minds to disregard a ministerial objection. For how are they to decide which of two opposite public interests should be sustained, the interest of the public in seeing that justice is done between private persons or between a private person and a public authority, and the interest of the public that the secrets of the executive should not be divulged? It is bound to be a question of degree, since, while we may suspect that objection is often taken on slight grounds, we cannot doubt that in other cases the grounds are substantial and the document if disclosed would be of minor value to the private litigant. The courts cannot themselves decide whether the grounds of objection are adequate, or whether the public interest would in fact be injured by production of the document in dispute. This is a matter for the Minister, whose view must be accepted by the courts (*Glasgow Corporation* v. *Central Land Board*, *supra*, *per* Lord Normand at p. 46, *per* Lord Radcliffe at p. 47). According to Lord Radcliffe, it may reasonably be expected that a court will be better qualified than a Minister to measure the relative importance of the opposing public interest affected in application to the particular case before it. But, if the Minister's view of the injurious effect of production must be accepted without inquiring into the basis of that view, it does not seem that the courts will have any method but guesswork to adopt in coming to their decision one way or the other. Is it possible that the courts could be spared the need to make an embarrassing choice on insufficient grounds, and private litigants might benefit, if there were in existence an independent body with expert knowledge of administration and power of investigation to which the courts could refer the questions whether a particular document should be produced or not, and how the public interest in non-disclosure could be reconciled with the public interest in doing justice between litigants? Ministers themselves might welcome such a solution, or at any rate not oppose it whole-heartedly, since it appears from statements made last year in the House of Lords by the Lord Chancellor and in the House of Commons by the Attorney-General that they find the problem troublesome.

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

The exchange of scientific periodical literature in the legal sphere between the offices of journals such as ours ought to serve the purpose of enabling lawyers to keep abreast of developments and research in their particular field. *The Juridical Review* is therefore setting out to give its readers short summaries of the contents of the periodicals or of some of them in each issue. It feels that many subscribers will thereby know where to go for discussions on topics which they wish to follow up, as well as where general legal interests can be pursued. In addition a law journal for universities should make it possible for teachers and students to refer, as is expected in some subjects, to recent contributions to those subjects. It is naturally not possible to cover the whole field in each number but it is hoped to give readers a cross-section of the literature received.

Canadian Bar Review. Vol. xxxiv, No. 10. December, 1956.

First place is given to an article by McArthur J. Stone of Halifax on wrongful expulsion from trade unions. He considers that the only fair remedy is one in tort rather than the normal one here based on contract. Membership is in the author's view rather of the nature of status, as indeed one can perhaps predicate of a position where monopoly has become the rule and exclusion renders the victim something of an outcast.

Mr. W. R. Lederman concludes his survey, largely historical, of how the judiciary has gained independence of the executive in North America, recalling the days when judges were sometimes prominent in politics.

Interesting to us is the favourable study made in the Comments in the *Review* of the Royal Commission on Marriage and Divorce.

International and Comparative Law Quarterly. Vol. vi, Pt. 1. January, 1957.

Among the Comparative Law articles in this issue is one dealing with the relation of the rights of the individual against the State in the law of Islam. Islamic jurists failed to find any method of condoning disobedience to the ruler, a problem with which the West was also faced. Pakistan is anxious to preserve its basis as an Islamic state, unlike Turkey which abolished the Shariʻa. Her solution is to discard the jurists and go back to the Koran. This attempt is likely in the author's opinion to raise as many difficulties for the orthodox Muslim as it seeks to avoid.

A discussion of the relation of Britain to a divided Germany with a record of the development of relationships comes within International Law. Even more directly so is the survey by the editor of our own contemporary practice from day to day in the field of International Law. All students will find it necessary and clear.

Conflict of Laws provides several topics, not least domicile, the modification of the law relating thereto being likely to be a bone of contention for a long time.

Differing from all these and not quite fitting any of the categories is a scholarly summary of the possibility of a Church which repudiates divorce *a vinculo* being able to recognise grounds of nullity based, of course within narrow limits, on similar grounds.

Journal of Business Law. January, 1957.

We extend a welcome to this new-comer to legal publications. Its production is based on the principle that modern conditions require that business law is a complete and living branch of law which extends beyond mercantile law and requires a broad view to be taken, and which necessitates practical research. It is not difficult to see the force of this and the first number suggests that lawyers will appreciate its content. The editorial personnel are drawn in many instances from the staff of the City of London College, and Stevens and Sons are the publishers. It is perhaps not too soon to point out to them that they should be astute to keep an eye open to decisions on relevant matters by the Scottish courts!

The Editorial part seems to deal with public pronouncements on general legal topics as well as on recent leading cases such as the *Vantol* case (arbitration), the *Caspiana* case (shipping) and others, while the main section on Business Law consists of reviews by the different Departmental Editors of recent legislation and decisions in a very wide range of individual legal topics, including those relevant in the Colonies and America. There are also longer articles on subjects demanding a fuller treatment, for example, executors who find the estate they administer concerned with a private or family company.

The journal is as much a lawyer's as a business man's production and is likely to be of interest to members of the profession who aspire—and which of them does not—to be occupied with commercial subjects.

Law Quarterly Review. January, 1957.

This issue leads off with an article by M. Marc Ancel, Counsellor of the French Court of Cassation, who is also the editor of the International Review of Comparative Law and is well known in Britain. His subject is *Le Crime Passionnel*, and tracing the attitude towards it by criminologists and legislators in the past century, he finds that it now tends to be regarded as little different from other types of crime.

Mr. A. G. Guest discusses the English Act of 1938 giving the courts power to allot a provision to the family out of an inheritance and finds it less satisfactory than systems of the *legitima portio*, such as exists in Scots law. Students of English legal history are catered for in two articles, one on some early writs and the other on a sixteenth-century volume of Reports. A point on quasi-contract in Equity is dealt with in another study.

The review of recent cases, always modestly called Notes, which is the part to which most lawyers turn for knowledge and criticism is as full as usual but does not lend itself to summarising.

New York University Law Review. Vol. 32, No. 1. January, 1957.

Nearly two-thirds of this number is devoted to the first part of its Annual Survey of American Law, classified under Public Law. Each heading, treated separately has a general basis running through it and is supported by lists of the periodical literature which has appeared during the year in America. They all manage to be extremely readable and up-to-date and possibly it is unique as a conspectus of the subject, providing not only for Americans but for anyone else who desires it an opportunity to see how things move in American law. Under International law and on the Suez question, for instance, it says: "It is clear to the objective observer that, in practice and in fact, certain transnational business organisations are subjects of international law and, in many instances, of greater import than certain States." Conflict of laws is naturally concerned with concepts alternative to domicile, particularly as the U.S.A. has questions between the various states. Constitutional law has equally naturally discussion on subversive activities and on segregation and turns on the written Constitution. Judicial administration is interesting on topics alien to us such as the taking of "movies" in a court room as well as on those current here such as congestion in calendars and judges' salaries. Jurisprudence is concerned with the liability of the government for wrongs.

The University part of the *Review* has an article showing how far the warranty of seaworthiness has gone. The case where a ship was held to be unseaworthy because one seaman struck another on the head with a brandy bottle conjures up visions which call for the pen of W. W. Jacobs! On a different plane is the new solution New York State is trying in the difficult question of liability to third parties for motor accidents, showing that the British system is not the only one in this field.

Public Law. Spring, 1957.

The Current Survey is a digest by the editor of doings in the administrative sphere, covering legislation, reports and tribunal decisions during the last quarter of 1956 which seems to give a picture fuller than can probably be obtained elsewhere, both for the United Kingdom and the Commonwealth.

A contributed article (Mr. Ingress Bell, M.P.) discusses recent decisions by the courts on Crown Privileges as regards the right of the authorities to withhold production of documents, and analyses pronouncements by the Lord Chancellor and the Bar Council. It criticises as unnecessary the alleged ground for refusal of disclosure, merely where such disclosure tends to make civil servants less frank in expressing their views, as regards what are known as "class" documents. A polemical article (Eugene Forsey) paints a picture of the evils in the Canadian Parliament of their system of Speaker and Chairman's partiality and suggests that deterioration is at work. British West Africa is the subject of a review (Denys C. Holland) of the problems presented by cleavages in politics there and how far constitutional safeguards are likely to protect minorities. Ghana is seen as a test case.

Revue Internationale de Droit Comparé. Vol. 8, No. 4. October–December, 1956.

The *Review* opens with a provocative article on "Le Trial Anglais" by Professor Hamson, which is perhaps noteworthy as a *tour de force* differentiating French procedure from English. The author is no doubt in a position to evaluate the hearings in French courts, but his formulation might be open to misconstruction by its hearers or readers as omitting the judicial attitude of the English bench and bar and as somewhat glorying in things which the continental jurist considers defects in the English legal scene, such as newspaper publicity and reliance on cross-examination.

Other articles include one on the new British Restrictive Practices Bill (now enacted) and one on the history of the family laws of the Christian communities in the Lebanon founded on the Byzantine laws and influenced by federalism and Islam till it gives way to modern ideas.

The section consecrated to and continued from the original Bulletin of the *Société de Législation Comparée*, now in its eightieth year, is devoted principally to a verbatim report of a discussion between French and Yugoslav jurists on various topics. Its interest lies in the contention, to the Western mind ideological, of the communist (or in their phraseology " socialist ") States to form more democratic lines of organisation than ours, particularly as regards decentralisation of administration.

A substantial section of the *Review* is dedicated to Book Reviews in which appears a complimentary one of Professor Smith's latest work.

Western Political Quarterly. Vol. ix, No. 4. December, 1956.

Though published by the University of Utah, this Quarterly has a Board of Editors from ten universities and a number of colleges, making it fully Western in direction as well as in name, and its contributors are drawn from a very wide field. Professor Catlin of McGill University has an article on the functions of Political Science arguing for a modern and widened approach to the subject.

F. W. Neal of California University in an article on American world leadership is highly critical of American foreign policy in this regard. He is not hopeful either of the attempt to wean states from communism or to bolster up administrations simply because they are anti-communist, but he does not propound an alternative policy. A number of articles deal with Commonwealth problems from various angles. The British handling of Malta comes in for a measure of praise. A study from Australia treats of the great Catholic influence which has existed in the Australian Labour Party and discusses its possible future course. Another article deals with politics in Quebec and points to the way in which *e.g.*, industrialism is loosening the bonds which affected the French and Catholic position in Canadian politics. It is perhaps suggestive and instructive to notice how Americans study the internal questions of the British Empire and to wonder that we do not do so more ourselves.

Periodicals also received: *Revista del Foro* (Lima), *Revista Jurídica de la Universidad de Puerto Rico*, *La Justícia* (Mexico), *British Tax Review*, *Jus* (Milan), *The American Journal of International Law*, *The Modern Law Review*, *The British Journal of Administrative Law*, *Oklahoma Law Review*, *American Bar Association Journal*.

RECENT LITERATURE

Judicial Process upon Brieves, 1219–1532. The Twenty-Third Lecture on the David Murray Foundation in the University of Glasgow. By Hector McKechnie, B.A.(Oxon.), LL.D.(Glasgow), Q.C. 1956. Glasgow: Jackson, Son & Co. Price 5s. net.

It is not easy for anyone to review adequately the twenty-third Lecture on the David Murray Foundation in the University of Glasgow. Mr. McKechnie, a scholar by nature and by heredity, is so obviously master of a subject about which few, except the late Lord Cooper and himself, have known much, that to attempt to review this Lecture is almost impertinence. It may, therefore, be wiser to follow the practice of the more old-fashioned reviewer and read this Lecture from start to finish.

A brieve, remarked Sir John Skene, is " ane schort compendious write " and this description might almost describe Mr. McKechnie's own Lecture. It is not easy reading. But this is no disparagement of Mr. McKechnie; on the contrary, the difficulty arises from the fact that he has condensed into some twenty-seven pages a subject which would justify a monograph.

" In form a brieve was a command in the King's name issuing from chancery, to which in appropriate cases it was ' retoured ' or returned, calling upon an official, a commissioner *ad hoc*, or an interested party, to adopt a course, positive or negative, which justice was thought to require." The earliest known procedural brieve in Scotland was an order, after the form of an interdict, by Alexander I in 1110 to the Prior of Durham not to litigate about the lands of Swinton in Berwickshire until the matter came before the King in person. Mr. McKechnie, however, is concerned with that type of procedural brieve which was not a mere incidental step in justice, but which initiated process. The earliest recorded instance of such a process appears to be one of 1219 relating to perambulation of marches, one of the seven types of procedural brieve which were familiar to the profession in the sixteenth and seventeenth centuries. He finds charter evidence of only two more of the seven familiar brieves besides perambulation in use before the Wars of Independence, namely succession and terce. But this at least shows that Craig and Stair were mistaken in thinking that the chancery forms they knew were only introduced into Scotland on the English model by James I on his return from captivity in 1424. He goes on to show that some nine writs of this type were represented in the records in the thirteenth century.

One of the most interesting aspects of the Lecture is Mr. McKechnie's comments on certain of Lord Cooper's conclusions in his Stair Society volume on the subject (Vol. 10). At one point Mr. McKechnie, with respect and reluctance, feels compelled to differ from his former master's conclusions. Lord Cooper expressed the view that " by the second half of the fifteenth century the brieve as a method of initiating proceedings *before the Lords of Council* had all but vanished" and then adds: "It would be distinctly odd if the Sheriff Court adhered strictly to the brieve system after that system had been found too rigid for the central court." On this passage, Mr. McKechnie comments: "Naturally I tread softly in such footsteps, but I fear the fact is that the brieve, being a writ to justiciar or judge ordinary or the like, never was a method of procedure before the central bodies, such as the Session, Council, or Auditors." Mr. McKechnie seems right, but it would also have been refreshing to have read Lord Cooper's rejoinders to Mr. McKechnie's various comments.

J. R. Philip.

A Source Book and History of Administrative Law in Scotland. By Various Authors. Edited by M. R. McLarty, M.A.(Cantab), Advocate, and G. Campbell H. Paton, M.A., LL.B., Advocate. 1956. Edinburgh: Wm. Hodge & Co., Ltd. Price 21s. net.

The reader who is led by the title of this book to expect a Scottish counterpart of "Griffiths and Street" will not find these expectations realised. Mr. McLarty's view of his subject is in one way more comprehensive, and in another narrower in outlook, than that of Messrs. Griffiths and Street. He has expounded by means of a series of separate essays, each contributed by a writer of authority, the historical development of the law affecting Scottish administration in its central and local aspects. In so doing he covers a tract of territory largely left unexplored in Messrs. Griffiths and Street's *Principles of Administrative Law*. On the other hand, subjects which have been much discussed as of great importance in the development of administrative law in Great Britain, such as, for example, the control of executive discretion, the administrative tribunal, the public corporation and the like, are not treated in Mr. McLarty's book.

Despite the increasing amount of attention devoted to it in these days, administrative law in this country is still in too fluid a state to permit of undue dogmatism as to its precise confines; and Mr. McLarty may, with reason, point to Sir Ivor Jennings' definition—"Administrative law is the law relating to the Administration. It determines the organisation, powers and duties of administrative authorities"—as justifying his approach to the subject. It may be felt that the best presentation of the subject lies somewhere between the extreme positions taken up by Messrs. Griffiths and Street on the one hand and Mr. McLarty on the other. An exposition of administrative law, which does not examine in considerable detail the structure and the powers of central and local authorities, leaves a feeling that the law is being studied *in vacuo*, whereas too exclusive a regard for the administrative structure precludes an examination of many wider implications of the subject.

Whatever view is taken of the scope of its subject, there will be little room for difference of opinion on the merits of this book within the limits chosen for it. The ordering of the separately contributed chapters has been deftly managed so as to give a remarkable degree of homogeneity to the work as a whole. All the contributions are interesting and provide a great deal of information not readily accessible to the student. All are well written and readable though it is perhaps not surprising, in view of the practical difficulties of carrying through a project of this kind, that a few minor blemishes may be detected. There is evidence of hasty writing in the order of the sentences in the penultimate paragraph of Sheriff McKechnie's interesting chapter on Valuation and in the expression of the last sentence of the first complete paragraph on page 221 in Mr. Templeton's comprehensive chapter on Water.

On the whole, the uniformly high level of the contributions is impressive, a quality which need hardly be remarked upon in view of the distinguished band of collaborators on whose assistance Mr. McLarty has drawn. Some topics lend themselves more readily to exposition than others. An outstanding example is Dr. Pryde's attractive chapter on Burghal Administration. Others, such as Sir Patrick Laird's chapter on the Office of Secretary of State, the late Mr. William Gordon's chapter on Housing and Town Planning, and Sir John Imrie's chapter on Finance, show what can be made of less promising material. A chapter on private legislation procedure would have been of great value, but, rather unaccountably, this is omitted.

The work is designed for students, and no attempt has been made to deal in detail with the law as at present in force, the exposition being confined to a study of the sources and development of the law on the selected topics. This has been carried through successfully and it is no criticism, rather the reverse, to wish that Mr. McLarty, having proved so eminently accomplished an *accoucheur* in the birth of this volume, had successfully delivered his patient of twins. Undoubtedly the book will be of great assistance not only to students of Scottish administrative law but also to practitioners who may find in it background information of value when considering the problems of administrative law which arise in practice.

Mr. Paton has provided a useful index.

J. Bennett Miller.

Late Sittings. By A. Laurence Polak, B.A. (Hons. Classics) (Lond.), a solicitor of the Supreme Court. Illustrated by Leslie Starke. 1956. Chichester: Justice of the Peace, Ltd. Price 9s. 6d. net.

This little volume consists of a further collection, twenty in number,—a previous collection appeared in 1953 under the title *Puffs, Balloons and Smokeballs*—of the weekly essays written by Mr. Polak during the past five years for the *Justice of the Peace and Local Government Review*, essays " sometimes (though not invariably) with legal affiliations but always with a bias toward the humanistic point of view," and intended " to leaven the loaf of erudition with a little extra of the yeast of humanity and humour." This object is more than adequately attained, the essays being at once scholarly and humorous.

Beginning with an essay on the topical issue of baby-sitting, likened to " standing sentinel over an unexploded bomb," one passes on to such enticing topics as the progressive outlook in some prisons, the value of a change of reading from the law journals to the women's weeklies, the amazing possibilities of advertising in the legal profession, the drastic changes in the modern outlook of young children and schoolgirls, the effect on burglars of lack of sleep, slanderous imputations that were made as to how the Italians were victorious in Greece in 1940, the dangers of smiling in the vicinity of the police, human juke-boxes, the dreadful effects of the law's delays on frustrated humanity, and the up to date "reasonable man," and the volume finishes with a chapter on the necessary atmosphere for tea-drinking with particular reference to the civil service.

The essays were inspired by recent strange happenings or states of affairs in different parts of the globe, such as the ongoings in a Swedish prison, where one prisoner conducted a flourishing commercial business from his cell or from expensive restaurants, the postponement of a school nativity play owing to the appearance of "Archangel Gabriel" at a juvenile court, the burglar recognised by his teeth, and the husband who recorded his wife's nagging. The exemption from taxes of Portuguese bull-fighters lest in a dangerous occupation they had their minds distracted—"You lucky people" in the words of Mr. Tommy Trinder—has interesting possibilities.

Witty, and learned, and delightful to read, the value of the book is enhanced by the apposite and skilfully drawn illustrations of Leslie Starke. The purchaser of it will find himself richly entertained and handsomely rewarded by the increase in his knowledge of human nature and the ways of the world.

G. Campbell H. Paton.

Trial by Jury. By Sir Patrick Devlin, One of the Justices of the High Court of Justice (The Hamlyn Lectures, Eighth Series). 1956. London: Stevens & Sons, Ltd. Price 15s. net.

The present age is one in which ancient institutions are freely criticised and evaluated afresh without undue deference being paid to their antiquity. Among the legal institutions of England of greatest antiquity is trial by jury and one which has in the past received its due share of uncritical veneration. It deserved a re-assessment in a series of Hamlyn Lectures exclusively devoted to it, not least because its traditional function in associating laymen with the administration of justice is closely related to the overriding object of the Hamlyn lectures, "to further the knowledge among the people of this country of our system of law," and it is fortunate that the lectures on this theme have been delivered by a distinguished member of the High Court Bench who can speak from experience and observation.

Possibly unfortunately from the jurisprudential angle the lectures are mainly descriptive rather than evaluative or critical and the learned lecturer is distinctly reticent about his personal impressions of jury behaviour. Does he, for example, know of cases where a jury has been completely befogged (apart from *Mechanical and General* v. *Austin*, which he mentions), or muddled by the judge's charge, or has given absurd or inconsistent verdicts? His Lordship's general feeling seems to be that the jury institution is theoretically defective in many respects but that it works on the whole very satisfactorily, that it should be retained and not even modified in any material respect. This is a distinctly more favourable view than that of many academic critics such as Dr. R. M. Jackson and Dr. Glanville Williams. This may be due in part to the fact that the reviewer's experience is that jury trial is much more satisfactory in criminal than in civil cases and in England jury trial in civil cases is largely obsolete. (The figure of 2–3 per cent. of civil actions is given at p. 132; the figure in Scotland must be considerably higher.)

The learned lecturer recognises the theoretical defects of the jury. that "its invention by a lawgiver is inconceivable" (p. 4), that it is not really representative of the people as a whole and necessarily loses in ability from the exclusion of so many professional men and women (pp. 20–21), and that, apart from decisions on credibility there is "no mystical quality distilled from twelve men selected at random which enables them in all cases to find the facts better than a judge alone could do" (pp. 149–150), but he believes that the peculiar combination of judge and jury in facts works out better justice than another system would, tempering law with equity, that jury trial is a safeguard of the independence and quality of the judges (in that judges can be coerced and led but juries cannot), and that the jury is a safeguard against repugnant or iniquitous laws. The last conclusion is possibly doubtful in view of Dr. R. M. Jackson's researches (which are not referred to in the notes) into the part played by the jury in the great causes of personal liberty, while the independence of the judges is surely secured as much by the presence of the Press and the legal reporters and the practice of criticism of decisions in the learned journals as by the jury.

His Lordship recognises that the jury qualification is narrow and with the statutory exemptions narrower still. The jury is "predominantly male, middle-aged, middle-minded and middle-class." But, he argues, "it might be dangerous so long as the unanimity rule is retained to equate the jury franchise with the right to vote. . . . If unanimity is insisted upon and the narrow franchise is preferred, it is no doubt right that juries should be taken out of the middle of the community *where safe judgment is most likely to repose*." Are the last words justified? No doubt there is sense, even if it is undemocratic in theory, to restrict jury service to householders or possessors of a property qualification but on what basis can it be thought that safe judgment is most likely, that unanimity can most confidently be expected from that group alone? So too it seems questionable if jurors do "take pleasure in the service of the law." It is satisfactory to note that his Lordship classes the unanimity rule as simply an antique, historically explicable, and its retention as a "classic piece of conservatism" though on the whole he wishes to retain the rule. But does the suggested justification for retention, that if there were a dissenting minority, "that would of itself suggest the existence of reasonable doubt and might impair public confidence in the criminal verdict" (p. 56), not imply a kind of group-minded hypothesis? Experience of benches of judges shows that it is quite easy for facts to appear in a different light to one judge from others. So too, at p. 140, of credibility it is said that "the impression made upon *a mind* of twelve is more reliable." Surely such cases are explicable easily enough on the basis that one or two or three are not satisfied but the majority are. This attitude to jury psychology seems, with all respect, unsatisfactory.

It will be seen that there is a great deal of interesting and enlightening comment and discussion in these lectures which no student of the English legal system can afford to overlook; the interested layman, to whom the lectures were primarily addressed, could not fail to be interested while professional lawyers too can study the lectures with profit. It is regrettable, however, to notice the increased price. DAVID M. WALKER.

A History of English Law. By Sir William Holdsworth, O.M., K.C., D.C.L., Hon. LL.D. Vol. I, the English Judicial System (7th revised edition) with an introductory essay by Professor S. B. Chrimes and under the general editorship of Professor A. L. Goodhart and Professor H. G. Hanbury. 1956. London: Methuen & Co., Ltd. Price 45s. net.

Volume I of Sir William Holdsworth's monumental fourteen-volume *History of English Law*, which took him twenty years to write, has now been republished in its seventh revised edition. Dealing as it does with the history of the English judicial system (perhaps the most important aspect of any legal system) it differs from the other volumes in the series in that it has always been in common use in England as a student's textbook. The first edition of volume I was rewritten by the author as he completed the later volumes and acquired fresh knowledge in the course of his Herculean labour. He later revised other editions until the fourth edition in 1927. This seventh edition has been produced under the general editorship of Professors A. L. Goodhart and H. G. Hanbury who have provided corrections and there is also a supplementary essay by Professor S. B. Chrimes setting out the more recent additions to knowledge. Although covering a wide range in some eighty pages this essay is excellent but its detailed information might be more accessible to the student if split up and added to the appropriate chapters either as additions or footnotes to the text. The original text requires no fresh commendation. It still stands and will probably always stand as the only detailed comprehensive survey of English legal history.

This volume still contains no reference to Scottish legal history or for that matter the legal history of any neighbouring country. It is thought that some comparison might prove interesting and helpful. How, for instance, the Scottish Sheriff Court was introduced by the Scottish-Norman Kings copying the English-Norman judicial system; how and why the sheriff court has survived in Scotland until the present day whereas in England it gradually declined in importance to leave a void filled only comparatively recently by the county court. It is thought that when the history of Scots law comes to be properly written it may benefit later editors of Holdsworth just as Holdsworth's example will surely benefit the Scottish legal historian.

The basic facts of Scottish legal history are now being gradually assembled by the Stair Society. Publications, however, of source material and compilations of essays by different persons on different aspects of Scots legal history do not displace the need for the comprehensive survey by the single scholar and all-embracing mind. Some person is needed with time at his disposal and great tenacity of purpose. The history of Scots law and of the Scottish judicial system has still to be written. Scotland unfortunately still lacks her Holdsworth.

W. A. Elliott.

Forms of Roman Legislation. By David Daube, Regius Professor of Civil Law in the University of Oxford. 1956. Oxford: The Clarendon Press. Price 21s. net.

The importance of this book is out of all proportion to its small dimensions. It represents the first demonstration in the field of legal history of a technique which has been used with effect in other fields of study, such as literary and biblical criticism. The technique is that of form criticism. Students of legal history are familiar with source criticism, the aim of which is to discover which authors are responsible for which parts of a particular text. The aim of form criticism, on the other hand, is to unearth the formal units which are embedded in the text—in Professor Daube's words " to break through to forms prior to any definite source, and thereby to discover the factors ultimately responsible for the growth and preservation of an idea."

The technique depends upon two assumptions, first, that early forms are expressions not of the writer's whim but of communal experience and communal needs, and secondly, that these forms tend to survive when transplanted into a different context. That both these assumptions are justified must be admitted when the examples of the use of the method given by Professor Daube are considered. Thus he points out first that some early Roman rules are stated in the form " If a man murders another man he shall be put to death," whereas others are in the form " Whoever murders a man shall be put to death." In early legislation the latter type is rarer than the former; in later law it is just as common. The first form puts a situation which may arise and says how it is to be met. The second form refers to a category—" it is more general, abstract, detached." This observation allows us to see the " setting in life " of each form. The conditional clause, which tells a story, provides against a certain emergency, the relative clause provides what is to be done to a certain class of person; " The story has become a category." The change from the first form to the second represents an evolution from folk-law to a legal system.

Perhaps the most interesting example of the utility of the technique is afforded by the discussion of the meaning of *oportere*, which is sometimes used in a legislative enactment in place of the imperative. Daube shows that phrases like *oportet* or *necesse est* express a reference to higher authority rather than a direct command. The meaning is, " It is proper—according to some recognised standard." Thus its " setting in life " is not the making of law but the interpretation of law. In this way we can see the underlying reason for the fact that the word is applied exclusively to civil obligations, and never to praetorian. For only of a civil obligation can it be said, " it is the proper thing—according to established principles." The author uses these results to explain some alleged discrepancies in the sources.

In his third example Daube draws attention to a pair of forms which everyone has seen, and nobody noticed. In some rules the command or prohibition and the sanction are separated, *e.g.*, "This shall (not) be done; whoever disobeys will suffer," while in others they are combined, *e.g.*, "whoever acts (or does not act) thus will suffer." Again he shows that the difference of form is not due to chance. The separation of command and sanction indicates that the duty is complicated or unexpected, and the use of that form suggests that the rule is novel. Conversely in well-established rules an express command, distinct from sanction, is unnecessary. This leads in turn to some particularly important observations on the form of the Twelve Tables. Daube argues convincingly that the opening rule, which is preserved in a corrupt state, actually ran *si in jus vocat, ni it, antestamino*, and that it is wrong to supply *ito* after *vocat*, as editors have uniformly done. (As Daube shows later on in the book, the third person singular here is impersonal—"if there is a summoning into court"—and does not require, as has been thought, a change of grammatical subject.)

After illustrating the use of the technique, the author tackles some more complicated problems of legislative form. Among others he disposes of the misconceived theory—which has been repeated by one commentator after another for the last century—that a statute uses the imperative only in directions to magistrates without *imperium*, such as the quaestor, but uses some more polite form like the subjunctive to those with *imperium* like the praetor. This theory is shown to be without foundation.

In a later section, form criticism is applied to a highly sophisticated form found in two well known senatusconsults of the first century A.D., and the Trebellianum and Macedonianum. Each resolution is divided into the immediate motivation introduced by *cum*, the main operative part introduced by *placere*, and ultimate aim introduced by *quo magis* or *ut*. The discussion of this form shows the flexibility of form criticism in the hands of a master.

In the penultimate section we are given some examples of the survival of form in new settings, *e.g.*, the appearance of the imperative form, which is appropriate for statutes, in senatusconsults and magisterial edicts indicates the original provenance of the regulation in question. Finally we are reminded that despite the fact that many forms persist outside their original surroundings, there is undoubtedly a tendency for dominant forms to assimilate minor varieties.

The fact that the book originated in lecture form would be clear even to a novice in form criticism who had not read the preface. It bears many traces of the terse, clear, witty style which those who heard Professor Daube's lectures when he was Professor of Jurisprudence at Aberdeen will long remember. The argument is enlivened by many modern examples, although some readers, even in 1956, may have difficulty in remembering the circumstances in which Mr. Strachey issued his regulations concerning the use of BUs.

The method of form criticism may perhaps be related to the enormous interest of modern philosophers in the way in which moral and other statements are expressed. Professor Daube has demonstrated the value of form criticism so successfully that it will certainly be taken up by many legal historians. Important results may be expected from their researches. One fears that the method may be greatly abused by hands less deft and skilful than those of Professor Daube. But he can hardly be blamed for that.

PETER STEIN.

The Holmes Reader. Selected and edited by Julius J. Marke, Associate Professor of Law, New York University. *The Freedom Reader.* Edited by Edwin S. Newman. *The Marshall Reader.* Selected and edited by Erwin C. Surrency, Associate Professor of Law, Temple University. *The Wilson Reader.* Edited by Frances Farmer. *The Daniel Webster Reader.* Edited by Bertha M. Rothe. *The Medico-Legal Reader.* Selected and edited by Samuel Polsky, Associate Professor of Law, Temple University. *The Brandeis Reader.* Edited by Ervin H. Pollack. *The American Jurisprudence Reader.* Edited by Professor Thomas A. Cowan. The Docket Series, Nos. 1 to 8. 1955–1956. New York: Oceana Publications. Price $1.00 each volume, paper bound; $3.50 cloth bound.

Oceana's Docket Series has been designed to bring the essence of great American legal and political thought to both laymen and students in volumes of convenient compass, size and price. In size of volumes and underlying conception the series must be compared with the Pelican Philosophy series, volumes on great personalities and on specific themes, each edited by a competent scholar. But the difference is in the execution. The Docket books convey their impression of the theme, or the man and his influence, by a selection of passages from original texts, from speeches, opinions, writings by and about the hero, linked by notes and commentary by the editor. The Pelican books are writings *on* the theme or the man. All the books maintain a high standard and contain to a remarkable extent the quintessence of thinking and writing on the subject of the volume.

The Holmes Reader, the first volume of this useful series, deals with Oliver Wendell Holmes, the almost legendary Justice of the Supreme Court, and probably the best known, most loved and respected, and certainly the most quoted member of that court for very many years, if not indeed in the whole history of the Supreme Court. The editor has made a very judicious and satisfying selection of the very considerable amount of matter by and about Holmes. There is a good short life by Professor A. D. Hill, and appreciations by Cardozo and Pollock. Then follow substantial extracts from Holmes' best known speeches and writings, a selection which brings out well his love and reverence for the law and for liberty and justice, and a few specimens from the Pollock-Holmes letters which help to give an impression of the man even if they lack the sparkle of the speeches. The fourth section of the book consists of Felix Frankfurter's important review of Holmes' work on the Supreme Court, particularly in constitutional cases, which appeared in the *Harvard Law Review*, with its valuable excerpts from his judgments, while lastly there are evaluations, one critical, one favourable. The editor also deserves credit for the eight-page anthology in the Appendix of some of Holmes' most brilliant epigrams, phrases and purple passages. It is an excellent book and contains a very well-balanced selection of material which gives a rounded picture of the man and presents the pith and marrow of his thought, such that one cannot but wish that the life and thought and influence of some of our own greatest lawyers could be similarly presented.

The Marshall Reader (No. 3) deals with a figure possibly less well known on this side of the Atlantic, John Marshall, brigadier-general, congressman, Secretary of State, and Chief Justice 1801–1835. Marshall's abiding place in legal history rests on the sixty cases on constitutional law decided by the court during his presidency, in thirty-six of which he wrote the opinion himself. His great contributions to the constitutional law of the young Republic are well brought out in the central section of the book, but attention is also rightly given to his upholding of the standards of fair trial at the trial of Aaron Burr and to his decisions in other fields of law such as the law of nations. Marshall differs markedly from Holmes in that he wrote little apart from judicial opinions but his importance has given rise to a great quantity of writing about him and his influence, and in consequence this book presents Marshall almost entirely through the eyes of distinguished interpreters. The editor has made a judicious selection from the mass of available material and it is particularly valuable for the British legal student to have so many facets of Marshall's work and influence presented in moderate compass in papers by experts, culled from sources which are usually unavailable in this country.

The Wilson Reader (No. 4) is especially significant in the centenary year of his birth. It contains a good biography in thirty pages, four assessments of his character and personality, selections from Wilson's most significant pronouncements, such as his commitment to the idea of a League of Nations and the Fourteen Points Speech, and concludes with appreciations and evaluations of his work and influence. Wilson's intellectual status and the importance of his presidency makes this collection of considerable value and it conveys a clear impression of the man, and his achievements.

The Daniel Webster Reader (No. 5). Daniel Webster dates from nearly a century earlier than Wilson and he is much less well known in this country, but as orator and statesman his fame is secure in America. The volume dealing with him contains his autobiographical sketch, impressions of him by contemporaries, and specimens of his speeches, as public figure, lawyer and statesman, including such important speeches as his argument in the *Dartmouth College* case and in *McCulloch* v. *Maryland*. From these his importance as a constitutional lawyer and political scientist clearly appear, his approach in these matters foreshadowing Lincoln's.

The Brandeis Reader (No. 7). Brandeis was a lawyer rather than a public figure but one whose views have become of the greatest significance as they came to be more accepted and understood. His advocacy of the constitutionality of minimum wage and maximum hour legislation and his insistence on the social and economic background of legislature have been profoundly important in the legal recognition and protection of human values. The volume, apart from essays on his life and work, reprints the valuable paper on "The Right to Privacy" from the *Harvard Law Review* and his opinion in *Erie Railroad* v. *Tompkins*, as well as several other opinions which illustrate his liberal views on social, political and economic issues.

The Medico-Legal Reader (No. 6) deals not with a personality but with a subject, with what Scottish Universities know as Forensic Medicine, and it is interesting to note the tributes paid by the editor to the contribution of those Scottish Universities to the subject. It is announced as the first of a series sponsored by the Schools of Law and of Medicine of Temple University. The main topics covered are three, Law and the Mind, Medical problems of Personal Injury Litigation, and Medical Science in Criminal Cases, each consisting of a selection of articles by experts on various topics within these fields. As compared with the instruction given at least to law students in Scotland the articles go far deeper into purely medical detail while one article suggests a formula to evaluate an injury claim which the present reviewer cannot think is of any value in practice. It is unfortunate that it is one of the shortest extracts which deals with one of the most interesting subjects, legal aspects of sterilisation, abortion and artificial insemination; others deal with specialities of American practice such as lie-detectors and blood-alcohol breath tests to prove intoxication (which have been disapproved by the B.M.A.); but the most generally interesting are papers on the M'Naghten rules in America, the Handling of Mentally Ill Offenders in European countries and those on problems of evidence in cases involving medical elements. It is satisfactory to note that the editor from his sojourn in Edinburgh has not overlooked the differences of Scots law but most lawyers will find many of the papers here rather beyond them and going further into medicine than they are anxious or able to venture.

The Freedom Reader (No. 2) deals with civil rights and liberties in the U.S.A. and its theme is approached through the words of statesmen (Truman, Eisenhower, Hoover), academic scholars (Griswold, Chafee, MacIver), judges (Holmes, Frankfurter, Hughes, Black, Warren) and others. It is very much up-to-date with its matter on negro segregation and Communism and provides an interesting and valuable picture to the outsider of the present balance of freedom and authority.

In *The American Jurisprudence Reader* (No. 8), the editor essays the difficult task of presenting in little more than two hundred pages the cream of modern American writing on jurisprudence under the three heads of Philosophical, Analytical and Sociological Jurisprudence. Some of it is familiar but none the less valuable, such as Hohfeld's discussion of legal conceptions, but quite a number of the selections are largely unknown or at least not readily available in this country and it adds up to an impressive corpus of thinking about law in which the juristic quality challenges comparison with anything in Europe; Pound, the Cohens, Fuller, Frank, Yntema and others are jurists whose writings deserve to be preserved and made readily available for students in this way. It is also good to know that an Advanced Reader on Jurisprudence is in prospect.

These Docket books seem likely to have as great a success as the Pelicans in this country. Their editing evinces a high level of scholarship and they are fully equipped with notes, references and bibliographies which enable them to be utilised as a basis for further study. It is a very profitable and instructive exercise through them to make a better acquaintance with these classics of American thought and the series deserves to be warmly commended to readers in this country. DAVID M. WALKER.

Palmer's Company Precedents. Seventeenth Edition. Part I, General Forms. By K. W. Mackinnon, M.B.E., of Middle Temple, Barrister-at-Law (Consulting Editor) and R. Buchanan-Dunlop of Middle Temple, Barrister-at-Law (Editor). 1956. London: Stevens & Sons, Ltd. Price £7 7s. net.

It may be confidently asserted that, of the various books on company law and practice, this work occupies a position which cannot be challenged. Since 1877, through sixteen editions, it has provided authoritative guidance to those concerned with joint stock companies. The periodical revisions of the Companies Acts by the legislature and the development of judicial authority alike show this branch of law as a live and growing organism. None would dispute the proposition that society today depends more than ever it did upon the conception of the joint stock company as an integral part of its commercial, scientific, professional or even charitable and other fields. It is scarcely possible to find any enterprise in which it does not play an important and often vital part. Always exposed to criticism, whether lay, expert or parliamentary, the company with its practical effects and possibilities must continue to hold the prominent attention of all who participate in the affairs of men.

This publication has played its historical part in the achievements of a hundred years or more of development. How great that part may have been cannot be assessed but it must certainly have been considerable. Now this seventeenth edition adds its contribution to those of its predecessors. It is interesting to examine how it may differ from the most recent of them which was published rather more than five years before.

There has been a change of editorship from that of A. F. Topham, who, either in association with others or alone, had been editor for virtually thirty years following after the original writer. Much of his work remains, as is inevitable, for it continues to be apposite. Opportunity afforded by longer experience of the operation of the 1948 Act has enabled the text to benefit. But there is expansion in the range and variety of forms provided and a greatly extended list of cited cases drawn from English, Scottish, Irish and Commonwealth courts, as it has been sought to carry the usefulness of the book well beyond England and Scotland.

It is important to realise this work is chiefly a source of practical styles for the formation and administration of any type of company. It furnishes the material from which particular documents may be constructed; interpreting with authority the meaning and effect of that material. It does not in the main expound and develop principles. Thus it is to the working lawyer or company secretary that its value is most apparent. It is therefore worth while to examine to what extent the book may be useful to one such engaged in Scotland with Scots companies.

Many of the styles do not require to be peculiar to the country; for example those for memoranda and articles of association and generally all forms concerning issues of shares and stock exchange business. Where judicial procedure is involved, however, the position differs. Style forms given in this category are drawn from English court practice and rules and are largely useless in a different system. In fairness, however, it is obvious that any attempt to provide for other systems would have unduly enlarged the volume. The Scots practitioner will largely continue to find his judicial styles from other established sources.

It is satisfactory to observe that distinctions arising from Scots decisions are given where they exist. For example, on variation of the rights of shares defined in a memorandum of association, *Marshall Fleming & Co.* (1938 S.C. 873; 1938 S.L.T. 527) is adequately noted. It differs from English decisions in allowing variation where the contemporaneously registered articles of association contain the reserved power to do so. Sheriff court decisions are also cited appropriately, showing the exhaustive nature of the Editors' task.

In the treatment of exempt private companies, a category created by the last Act, the text is somewhat disappointingly deficient. When the overwhelming majority of companies in the United Kingdom is private, whereof a very large proportion is exempt in terms of section 129 of the Act, it is surprising to find so little attention given to this subject. The meaning and effect of the provisions of the Seventh Schedule to the Act (which contains the various requirements to be satisfied by a private company claiming exemption) deserve exposition and would stand considerable clarification. In stating (p. 844) that an exempt private company need not print for lodging with the Registrar the copy of the resolution by which it increases its share capital, the text fails to make clear that if it is an ordinary resolution it must be printed, as the concession under section 145 is, by an irritating omission, enacted only for special and extraordinary resolutions.

In the references to control of borrowing, the failure to cite the amending order of 1955 (S.I. 1955, No. 530) and the two of 1956 (S.I. 1956, Nos. 538 and 1190) is unfortunate. The latest of these, which reduced to £10,000 the previous general limit of exemption of £50,000, was made on August 1, 1956, the month with which the preface to the volume is dated.

In such a publication where size is an important factor, what to leave out can be a difficult question. The range of material here given is nothing if not comprehensive, taking account as it does of stock exchange regulations, with three chapters devoted to prospectuses, applications and allotments and underwriting with the appropriate and sometimes complex forms involved. Normally, as indeed the text suggests with reference to the preparation of a prospectus, an existing example is of more service than a book form. This can be said also of certain types of allotment letters. In practice there is less frequent need for these than for the more general styles applicable to nearly all companies, with the authoritative comment which is provided. Moreover, when preparation of documents in the former category is required, it should generally be possible without real difficulty to secure specimens from stock exchange or other related sources. Thus the question does arise whether the book might not be virtually as serviceable without certain such highly specialised forms.

There is great benefit from having a reference book containing statute, case law and forms in ready juxtaposition. Probably it is in this respect that this work has in the past rendered most service. This edition is largely a new book. While the marks of its ancestry remain plain, it shows, in textual lay-out and index as well as by the pruning away of the obsolete and the grafting in of the new, that this useful publication is evolving with its subject. The process should go on. Thereby the prefatory hope that the book will continue to retain the position it has held in the past will be fulfilled.

Andrew C. Bennett.

Pension Scheme Precedents. By William Phillips, Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd. Price £4 4s. net.

This is the first work of this nature to be produced in the United Kingdom and it combines precedents for the eight types of pension schemes from which some tax advantage can be gained. It also, and this is extremely important, explains lucidly the reason for adopting one of the particular eight forms instead of another and the reason for including any one of the particular precedents in one form and not in another.

The author has had a wide experience and can confidently say that each precedent given except those dealing with a 1956 trust scheme is in use today as part of the constitution of an existing pension scheme.

In drafting pension schemes a Scots lawyer finds that he has to deal almost entirely with English statutory law and English precedents. As pension funds are becoming much more popular and more widespread so the work of setting up such schemes or trust deeds, together with the work of amending them and altering them, is becoming of much greater importance, and there is no reason why they should not be drawn by a Scots conveyancer.

One difficulty in English law, which has never seemed to trouble Scots lawyers, is that English law usually appears to require a preliminary draft trust deed to be superseded when the trust is working properly. In Scotland, we see no incongruity in having trustees with full powers, beneficiaries with vested interests and yet no assets for the trustees to administer, or the beneficiaries to succeed to. A Chancery lawyer would regard such a state of affairs as verging on criminal law.

To anyone who has to advise on trust for pensions or to anyone who has to draft a pension deed this book (priced at four guineas) can confidently be recommended and is not likely to go out of date in the next few years.

The numbering is by paragraphs, which may be considered an advantage.

T. M. W.

The Apportionment of Damages Act, 1956. By R. G. McKerron, Q.C., D.C.L., Professor of Law in Rhodes University, Grahamstown. 1956. Cape Town: Juta & Co., Ltd. Price 19s. net.

This Act, No. 34 of 1956, described by the learned author as the most important piece of law reform carried out in the Union of South Africa since the Union, introduces substantially the same reforms into South African law as were effected in this country by the Law Reform (Contributory Negligence) Act, 1945 and the [English] Law Reform (Married Women and Tortfeasors) Act, 1935 and the [Scottish] Law Reform (Miscellaneous Provisions) Act, 1940, s. 3. This handbook by the leading expert on the law of delict in South Africa sets out to expound the Act and to deal with some of the difficulties to which it gives rise since, like almost any piece of law reform, it is not ideally expressed. The introduction sketches the background and draws attention to some significant variations between the South African and the United Kingdom legislation. It will accordingly not be wise or safe to cite decisions from the one jurisdiction as authorities in the other without careful comparison of texts. The main part of the book is a subsection by subsection commentary on the Act discussing its effect by reference to examples. It will undoubtedly prove of great value to practitioners in the Union particularly in the first year or two of the Act's working when precedents will be few, while in this country an examination of the Act's provisions is enlightening by contrast with our own principles. DAVID M. WALKER.

Income Tax Law and Practice. Twenty-seventh edition. By Cecil A. Newport, F.A.C.C.A., and H. G. S. Plunkett, Barrister-at-Law. 1956. London: Sweet & Maxwell, Ltd. Price 30s. net.

Income Tax Law and Practice by C. A. Newport first appeared in 1927. Since then it has appeared annually with the exception of only three years (1933, 1940 and 1955). Mr. Cecil A. Newport is still the chief editor and there can be few who rival his record of seeing twenty-seven editions of his work through the press.

For the first three years Mr. Newport edited it alone, and he was then joined by Mr. Donald Staples. As "Newport and Staples on *Income Tax*" it became deservedly one of the most frequently used books for both students and practitioners. From 1938 to 1948 Mr. Newport again edited each successive edition alone but in 1949 he was joined by Mr. O. J. Shaw and this year he is joined by Miss H. G. S. Plunkett, both of them barristers specialising in Tax. Miss Plunkett was formerly an Inspector of Taxes.

The chief advantage of this book over many others is that wherever possible the law and practice are taught by illustration and example, rather than by "bald and unconvincing narrative." It is to the wealth of its examples and illustrations that this book owes its continued and well deserved popularity among students and practitioners.

T. M. W.

Introduction to the Law of Scotland. By the late W. M. Gloag, K.C., LL.D., and R. Candlish Henderson, Q.C., LL.D. Sixth edition by Andrew Dewar Gibb, Q.C., LL.B., and Norman M. L. Walker, LL.D. 1956. Edinburgh: W. Green & Son, Ltd. Price 75s. net.

Now that *Gloag and Henderson* has reached its sixth edition in thirty years its position is undoubtedly well established and its great merits and value need no further commendation, though they become fully apparent only when one compares it with its counterpart in some other legal system. England, notwithstanding its great wealth of books of every size for students, can boast nothing quite like *Gloag and Henderson* and it is no easy task for the learned editors to produce another edition in the present tradition, at once a lucid student's book and also the starting point for many a practitioner's search.

The new edition contains rather less substantial revision than did the last edition but there has nevertheless been a large amount of detailed revision to take account of the constant stream of statutory changes and new cases. In particular there has been a great deal of rewriting in the chapter on leases and new sections have been added to take account of the Crofters Act while some five pages have been added on the Rent Acts. This last addition may be a controversial one but in the present reviewer's view the addition is fully justified since it presented a quite unrealistic picture of the law of leases to omit mention of these Acts which in fact regulate important aspects of the tenancy of thousands of houses far more than do the principles of common law. The five-page summary is clear and adequate and is all that could be expected in a book of this character.

The table of cases has been improved by the giving of full references (including references to A.C. in the case of appeals) as well as the former reference to the page of text where the case is cited and this is of value since the latter references are to one series of reports only. Another new and highly commendable feature is a table of statutes, and this also should be of considerable value, possibly more to the mature reader than to the student, but none the less welcome. The preliminary note on the citation of cases has been revised though it might have been useful to add that a full list of the abbreviations of the older English reports may be found in such places as any volume of *Halsbury* and Sweet and Maxwell's *Where to look for your Law*. Also, although the T.L.R. were indeed latterly cited as, *e.g.* [1952] 1 T.L.R. 100, as stated, these useful reports were cited for most of their period of currency as, *e.g.* (1930) 45 T.L.R. 100, and only in their last few years did T.L.R. depart from the serial numbering of volumes. The useful bibliographical notes at the head of chapters have been revised and in some cases amplified though in some instances the latest edition of a book has been overlooked, *e.g.*, the 20th edition of Anson on *Contract*, the 4th edition of Macgillivray on *Insurance*, the 3rd edition of Munkman on *Employer's Liability*, while Arnould on *Marine Insurance* is mentioned as of the 13th edition on p. 360 and of the 14th on p. 310.

When one comes to examine the text it is difficult to resist the feeling that in the next edition there should be a rather more critical approach to it. It is not enough to preserve the life and usefulness of even such an essential as this simply by excising the overruled and repealed and by introducing the new decisions and the latest Acts, however faithfully that be done. If a textbook is to maintain its value and authority every line must be scrutinised critically lest statements go on being reproduced though the progress of research and decisions has rendered them slightly questionable. Thus for example on page 1 *Macgregor* v. *Lord Advocate* is cited for the proposition that it is "probably settled that in questions of constitutional law English decisions are authoritative in Scotland." This has become increasingly doubtful since the words were written and it will not square with the decision in *Glasgow Corporation* v. *Central Land Board* which shows that at least in the matter of Crown privilege for documents the law is *not* the same in both countries. In truth *Macgregor* is not very good law at all and the rash dictum of that case would be better forgotten. Again on page 2 no distinction is taken between prerogative Orders in Council and those other Orders in Council which are delegated legislation and published as Statutory Instruments.

In the same way there seem to be a good number of other points which could with advantage have been noted, even on the basis that this is a student's rather than a practitioner's book. For example, when dealing with damages in contract, *Hadley* v. *Baxendale* is cited and founded on but no reference is made to the improved restatement of the principle in *Victoria Laundry* v. *Newman* in 1949. *Duke* v. *Jackson* is cited on section 14 of the Sale of Goods Act without mention of *Wilson* v. *Rickett, Cockerell & Co.* (a case noted at the time and discussed in *The Scots Law Times*) which plainly suggested that the preposterous decision of *Duke's* case was wrong, a view which the late Professor Gloag himself held. Again at page 402, note 66, *Bourhill* v. *Young* is cited for a point which is at most an inference from that case but which was a matter of decision in the interesting and important case of *King* v. *Phillips*, which is nowhere mentioned.

Several instances were noticed too where recent statutory changes have been overlooked, though it is fair to say that printing is a slow business these days and that no law book can ever be absolutely up-to-date when it appears; thus (p. 432) the privilege conferred on sheriffs by the Summary Jurisdiction Act is given as of the 1908 Act though that section was replaced by a slightly different section in the 1954 Act, which Act is fully taken into account in the chapter on criminal law. Again there seems to be no mention of the important Mines and Quarries Act, 1954, which, although the Order bringing it into force was not made till October, 1956, should really have merited a footnote. In the result the Coal Mines Act, 1911, referred to at page 229, has been superseded and new sets of regulations under the new Act have also come into force. Again there is no mention of the Hotel Proprietors Act, 1956. In connection with these points it would be useful to have a statement in the Preface stating the date down to which the revision was effected.

On the whole, while it is not for one moment being suggested that *Gloag and Henderson* has lost or is in any danger of losing its value and authority, nor that the learned editors have done other than a very good and valuable job in preparing this new edition, it does seem to the reviewer that when the next edition is due in another five years or so an attempt should be made to look more critically at the text and that the editors should not rest content with what has stood so far. Should not, for example, the chapter on Reparation be broken up into several chapters or even, as is done quite successfully with some other chapters, several parts or sections?

The printers and publishers deserve separate mention in that they have steadily continued to improve the style and appearance of each successive edition and this edition reaches a new high level, which makes the book a pleasure to look on, to hold and to read, and the improvements in the invaluable apparatus of Tables and Index are most commendable. DAVID M. WALKER.

The Mercantile Law of Scotland. Fifth edition. By J. A. Lillie, Q.C. 1956. Edinburgh: W. Green & Son, Ltd. Price £1 10s. net.

In the latest edition of the *Mercantile Law of Scotland* that part of the text originally written by the late Mr. Allan McNeil has been superseded. Sheriff Lillie now takes sole responsibility for the work.

This is perhaps an appropriate occasion to reconsider its aims and the extent to which these aims are realised. The *Mercantile Law of Scotland* was intended, and apparently still is intended "to provide students preparing for the many examinations where Mercantile Law is now a compulsory subject with a comprehensive and systematic exposition of this branch of the law divested as far as possible of technicalities of expression." Viewed as a "comprehensive and systematic exposition of Mercantile Law" Sheriff Lillie's work attracts the respect and admiration of the reviewer. In the recently rewritten chapter on bankruptcy the author deploys his expository talents with conspicuous success. Equally, his treatment of the Companies Acts is a model of compression and careful selection.

The book is expressly stated to be "primarily intended for the use of students." For law students it is usually a prescribed text and well suited to their needs. They come, or should come, to it with some knowledge of the origin and development of Scots law, with the organisation of the Scottish courts, with the methods by which rights are asserted in these courts, with the distinction between statute and case law, and with the nature of legal reasoning. But it is suspected that the book is used even more frequently by students of accountancy, banking and commerce and for these students it may well be their only contact with a Scottish legal textbook. They come to it without that prior knowledge which Sheriff Lillie's presentation of the law presupposes. They are plunged into all the technicalities of commercial law and are expected to grasp without explanation the meaning of such technical terms as arrestments, poindings, adjudications, etc. For these students it is too technical but also too detailed. The book is not, or is no longer, what the authors of the first edition claimed it to be, "a concise statement of principles."

A few points of detail may be noticed. Considering their importance in business today, hire-purchase contracts are treated with disproportionate brevity. The description of the functions of bills of exchange is unsatisfactory and the student will gain no clear idea of their use in current mercantile practice. Bills similar to that illustrated on page 181 must, in the 1950's be very rare specimens indeed.

On page 145 it is stated that, "In contracts falling within the provisions of the Carriage of Goods by Sea Act, 1924, a limit of £100 per purchase or unit is imposed unless the nature and value of such goods has been declared . . . ." This is misleading. The monetary value is to be taken as gold value and it is possible, despite the case of *Treseder-Griffin* v. *Co-operative Insurance Society Ltd.*,[1] that this means today much more than £100 sterling. British insurers and shipowners in the British Maritime Law Association Agreement, 1950, agreed to accept liability up to £200. From the reference on page 286 to the Abbey of Holyrood one would surmise, but erroneously, that it was the only sanctuary in Scotland. Finally, although space is found in the chapter on insurance to deal with risks from pirates and rovers, there is no discussion, despite its practical and juristic interest, of insurance against third party risks.

A Century of Family Law, 1857–1957. Edited by R. H. Graveson and F. R. Crane. Foreword by the Right Honourable Lord Evershed, Master of the Rolls. 1957. London: Sweet & Maxwell, Ltd. Price 35s. net.

The occasion for this book has been provided by the fact that one hundred years ago divorce by judicial process became for the first time possible in English law and 1957 seemed to the staff of the Faculty of Laws at King's College, London, to be a suitable time to review the changes and developments wrought in matrimonial and family law in that century, a period marked by the emancipation of women in numerous ways, by tremendous changes in the social attitude to divorce and family life, by changes in the legal approach to the guardianship of children and in a great variety of consequential legal changes. The book is also noteworthy in that royalties derived from the sales will be devoted to a charitable trust established for the benefit of students in the Faculty of Laws of King's College. On this ground, if for no other reason, the book deserves the attention of all interested in family law and the charity their sympathetic support.

But that is in truth one of the slightest grounds on which the book deserves commendation. It consists of a series of papers by various members of the Faculty of Laws at King's College on various aspects of family law and while attention has naturally been concentrated on the last century, 1857 has not been too rigidly adhered to as the *terminus a quo*. Nor do these papers stick rigidly to the fact that the century is technically a century of divorce law only. For it is rightly recognised that the period has seen enormous changes in all branches of family law and the introduction of judicial divorce has been only one, though possibly the most striking and fundamental, of a great series of changes which have *in cumulo* completely transformed the legal position of women and children. Consequently the various chapters survey every branch of the subject and include some matters which might well not be covered at all in a more conventional textbook approach to family law. Thus there is a lively and entertaining paper on Women in Public Law discussing the movement for women's education, the suffragette movement, and the entry of women to the professions, and valuable surveys of Evidence and the Criminal Law with their survivals and anomalies affecting the position of women in these branches of the law. Still less would the conventional approach to Family Law have given us Professor Graveson's perceptive first chapter on the Background of the Century or his final chapter on the future, which includes an analysis of the report of the Royal Commission on Marriage and Divorce, in which he takes a line more favourable and less critical than does Professor Kahn-Freund in 19 M.L.R. 573.

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[1] [1956] 2 W.L.R. 866.

The other chapters survey the more conventional topics, marriage, legitimation and adoption, tort, contract, settlements, matrimonial tribunals and relief, and conflict of laws. All display a very high standard of scholarship but, while not lacking discussion of principles and cases, have approached their subjects in the manner of the law review article rather than that of the textbook, so that the information is more pleasantly conveyed and more digestible. Both in England and elsewhere readers will be glad to have this very valuable survey which is naturally strong in its discussion of historical development and evolution yet gives ample space to exposition of the present position, adequately vouched by references without being overburdened. As a survey of a very important and interesting chapter of the law it must be warmly welcomed and there should be many in Scotland who would benefit from a reading of it and who would, moreover, enjoy the reading.

DAVID M. WALKER.

Laws and Flaws: Lapses of the Legislators. By Edward F. Iwi. 1956. London: Odhams Press, Ltd. Price 21s. net.

This is a book of very mixed interest and value; some of it is a chronicle of very small beer indeed and the reader may well be infuriated by the writer's pride in his own achievements, in having pointed out on a number of occasions to responsible officials a *casus omissus* in legislation or parliamentary procedure. Much of the book consists of the discussion, frequently very briefly, of points raised by the author in correspondence in the Press or in memoranda to government officials on matters of constitutional law. Some of the irritatingly short chapters have really nothing in them at all; the chapters on delegated legislation are, at least for the lawyer, in this category. On the other hand a number of interesting, useful and even valuable points are made in various places; there is, for example, the point that the sovereignty of Parliament is not absolute in that the Queen could not consistently with her accession oath to maintain the Church of Scotland assent to a Bill altering that; and the point that under section 4 (2) of the Regency Act, 1937, a Regent has no power to assent to an Act repealing the Union.

Again in relation to the claim of Crown privilege for documents required at a trial it seems a good point that the documents in question could surely be produced and inspected by the judge if he is a Privy Councillor (as all Lords Justices of Appeal and some Lords of Session are) since such a judge is bound by the Privy Councillor's oath of secrecy. So too the discussion of the precise constitutional position of the Lords of Appeal in Ordinary is valuable particularly its emphasis that they are Lords of Parliament and have not suffered ennoblement of blood which would make them peers (though of course some of them may be peers *stricto sensu*).

The best chapters are the two on parliamentary maces which embody much good historical research, and that, reprinting an address given before the Grotius Society, criticising the narrow and national character of the Privy Council and the Judicial Committee thereof, a body which should properly be of a more Commonwealth character. So too there are interesting topical passages such as that on the Sovereign's choice between two candidates for the office of Prime Minister and the possible position of Ghana under the Statute of Westminster, 1931, which has no provision for the inclusion of further "Dominions" which might become independent after 1931.

The book is accordingly rather a mixed bag; at its best some very interesting and shrewd comment and criticism of constitutional anomalies and difficulties, which would pass a very pleasant evening, but interlarded with chapters of trivialities. DAVID M. WALKER.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

The Council of Europe. Its Structure, Functions and Achievements. By A. H. Robertson, B.C.L., S.J.D. With a Foreword by Guy Mollet. The Library of World Affairs No. 32. Published under the auspices of The London Institute of World Affairs. 1956. London: Stevens & Sons, Ltd. Price £2 2s. net.

The Paris Commune in French Politics 1871–1880. The History of the Amnesty of 1880. Volume I—The Partial Amnesty; Volume II—The Final Amnesty. By Jean T. Joughin. The Johns Hopkins University Studies in Historical and Political Science. Series LXXIII (1955). Numbers 1 and 2. 1955. Baltimore: The Johns Hopkins Press.

A Bibliographical Guide to the Law of the United Kingdom, the Channel Islands and the Isle of Man. Published under the auspices of UNESCO. 1956. London: Institute of Advanced Legal Studies. Price 30s. net; interleaved copies 36s. net.

International Law Opinions. Selected and annotated by Lord McNair, Q.C., C.B.E., LL.D., F.B.A. Three Volumes: Volume 1—Peace; Volume 2—Peace; Volume 3—War and Neutrality. 1956. London: Cambridge University Press. Price £9 9s. net the set.

A History of English Criminal Law and its Administration from 1750. By Leon Radzinowicz. Vol. 2, The Enforcement of the Law. Vol. 3, The Reform of the Police. 1956. London: Stevens & Sons, Ltd. Price £4 4s. net each vol.

Roman Foundations of Modern Law. By H. F. Jolowicz, LL.D. D.C.L. 1957. Oxford: The Clarendon Press. Price 35s. net.

Law and Orders. An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law. Second Edition. By Sir Carleton Kemp Allen, M.C., Q.C., D.C.L., Hon. D.C.L.(Glasgow), F.B.A., J.P. 1956. London: Stevens & Sons, Ltd. Price £2 2s. net.

Report of Proceedings of Sixth Congress of the International Association of Democratic Lawyers. Brussels May 22–25, 1956. 1956. Brussels: The International Association of Democratic Lawyers.

The Trusteeship System of the United Nations. By C. E. Toussaint, M.SC.(Econ.), PH.D. Published under the auspices of The London Institute of World Affairs. The Library of World Affairs No. 33. 1956. London: Stevens & Sons, Ltd. Price 37s. 6d. net.

Archbold's Criminal Pleading, Evidence and Practice. Tenth Cumulative Supplement and Noter-up to Thirty-third Edition. By T. R. Fitzwalter Butler, Barrister-at-Law, and Marston Garsia, Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd.

The Law of Restrictive Trade Practices and Monopolies. By R. O. Wilberforce, Q.C., Alan Campbell, M.A., and Neil P. M. Elles, M.A. Consulting Editor R. Gresham Cooke, C.B.E., M.P. 1957. London: Sweet & Maxwell, Ltd. Price £4 4s. net.

A Legal Bibliography of the British Commonwealth of Nations. Second Edition. By J. S. James and L. F. Maxwell. Volume 2: English Law from 1801–1954. 1957. London: Sweet & Maxwell, Ltd. Price £3 3s. net.

Report of International Law Conference Held at Niblett Hall, June, 1956. 1957. London: The David Davies Memorial Institute of International Studies. Price 4s. net.

Report on First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Geneva, August 22–September 3, 1955. 1956. New York: United Nations, Department of Economic and Social Affairs. Price 9s. net.

Robert Oliver, Merchant of Baltimore, 1783–1819. By Stuart Weems Bruchey. The Johns Hopkins University Studies in Historical and Political Science. Series LXXIV, No. 1. 1956. Baltimore: The Johns Hopkins Press.

Political Theory and Institutions of the Khawarij. By Elie Adib Salem. The Johns Hopkins University Studies in Historical and Political Science. Series LXXIV, No. 2. 1956. Baltimore: The Johns Hopkins Press.

The Law in Action. A Series of Broadcast Talks. Volume 2. With a Foreword by The Rt. Hon. Sir Alfred Denning. 1957. London: Stevens & Sons, Ltd. Price 10s. net.

Yearbook of the International Law Commission, 1956. Volume I. Summary Records of the Eighth Session, April 23–July 4, 1956. 1956. New York: United Nations. Price 22s. 6d. net.

Brief Writing and Oral Argument. By Edward D. Re. Second Edition. Revised and Enlarged. 1957. New York: Oceana Publications. Price $4.50.

JURIDICAL REVIEW

CHURCH AND STATE IN SCOTLAND *

WHEN our Lord was asked whether it was lawful to give tribute to Caesar or not, he replied: " Render unto Caesar the things that are Caesar's and to God the things that are God's." This is the distinction from which our civil liberty has taken its rise, for civil liberty, in Britain at any rate, has arisen as a by-product in the struggle for religious freedom.

What ought to be the relation between the Christian Church and the secular power or the State? Here is a question which raises issues of the first importance. It has been answered in various ways. At one extreme Innocent III, proclaiming the doctrine of the *plenitudo potestatis* of the Pope, ranges himself with John Calvin in his Genevan theocracy. For both of them the civil power is but a department of the Church; hence John Milton's complaint that new presbyter was but old priest writ large. At the other extreme are the Erastian lawyers for whom the Church is a mere social institution erected on principles of expediency by Act of Parliament. The Church of England, as established by Henry VIII and Elizabeth, seems to a Scotsman to have an Erastian flavour for there, as I understand it, the Sovereign is recognised to be the supreme governor, not only in things temporal but " in all spiritual and ecclesiastical things and causes." Even such a matter as the revision of the Anglican Prayer Book comes within the jurisdiction of Parliament, and many here will remember when the House of Commons refused to sanction such a revision. On that occasion the House was decisively influenced by a speech against the proposed new Prayer Book delivered by a Presbyterian Scot who was then member of Parliament for Paisley.

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* Being a lecture delivered on January 12, 1957, at Queen's College, Dundee.

Midway between these extremes is the answer which seeks to base itself on a distinction between spiritual and temporal power, between the civil authority or power of the sword, and the spiritual authority or power of the keys, both of them equally Divine ordinances, both of them supreme within their own proper spheres. This was a distinction which did not commend itself to the powerful mind of Thomas Hobbes who regarded any division of sovereignty as a contradiction in terms. But it was one which was cardinal doctrine in the Scottish Reformation. When Andrew Melville confronted James VI at Cupar and was reminded that he was the King's vassal, " Sirrah," he replied, " ye are God's silly vassal; there are two kings and two kingdoms in Scotland: there is King James the head of this commonwealth and there is Christ Jesus the King of the Church, whose subject James VI is and of whose Kingdom he is not a king nor a lord nor a head but a member." Important as this distinction is as a basis of civil and political liberty, it does not of itself solve all the problems. Render unto Caesar the things that are Caesar's: yes. But the lawyer will then ask two questions: (1) what are the things that are Caesar's, and (2) by whom is that question to be determined?

It might be of interest if I were to indicate how these problems have been approached in our country, and along what lines a solution has been sought. To do this we must travel a good distance back into history, keeping in view that Scotland was a kingdom separate from England until 1603, when the Union of the Crowns took place, and that even after that date Scotland had an independent Parliament until the Union of the Parliaments in 1707.

The Kirk in Scotland was " reformed from Popery by presbyters " in 1560 and thereafter her rights and liberties were declared and made effectual by a series of Acts of the Scottish Parliament, in particular the Act of 1592, which established the Kirk. The Reformers in their original documents, such as the First Book of Discipline, 1560, and the Second Book of Discipline, 1567, drew a distinction between civil authority, the " power of the sword " exercised by the magistrate, and spiritual authority, the " power of the keys " exercised by the Church. They held that the spiritual power flowed immediately from God and the Mediator Jesus Christ as the only King and Head of the Church. It comprised the preaching of the Word, administration of the sacraments, correction of manners, admission and deprivation of office-bearers, and generally the whole power of the keys. This high claim was not yielded without long and bitter strife. The struggle between the Kirk and people of Scotland on the one hand and the Stuart kings, James VI and I, Charles I, Charles II, and James VII and II, for the greater part of the seventeenth century, was caused by the set policy of those monarchs seeking to subordinate the Kirk to the sovereign power, and to ensure its subordination by imposing episcopacy upon its presbyterian polity. To some extent this was a social and political struggle as well as a religious one, for then, as now, the supporters of episcopacy were to be found mainly among the nobility and gentry.

The Revolution of 1689, the advent of William of Orange, and the failure of the Jacobite Rebellions of 1715 and 1745 (which despite the aura of romance with which they have been invested had no substantial support in Scotland outside certain parts of the Highlands) assured the survival of the presbyterian form of church government which was established and ratified by Act of Parliament in 1690, but they did not remove the risk that the State might still encroach on the jurisdiction of the Church. This encroachment became manifest in respect of two important matters, the control of the church over the appointment of her own ministers, and the power of the church to alter or interpret her subordinate standards of faith or polity. I shall deal with those two matters separately, and then show how they have been settled in the reunited Church of Scotland.

Before the Reformation the Pope was presumed to be patron of a benefice whenever the right of patronage did not appear to be established in anyone else. After the Reformation the King took the place of the Pope and was presumed patron *jure coronae* unless the right of patronage had been conferred on some other person. There were many cases, however, in which gifts of land, including the right of patronage, had been made by the Crown, and for three hundred years after the Reformation 1560 lay patrons had the right of presenting a minister to a charge. Presentation, however, was only the first step in the appointment. The presbytery concerned, consisting of ministers and lay elders, had to make trial of " the qualifications, literature, good life and conversation " (*i.e.*, behaviour) of the presentee, and, if satisfied on these points, they admitted him to the charge. At the Reformation and for long afterwards it was a burning question whether, and to what extent, the members of a congregation were entitled to participate in the appointment of a minister. One extreme view, contained in Knox's *First Book of Discipline*, 1560, was that the members of a congregation, and they alone, had the right to elect a minister, subject, of course, to the control of the presbytery. This view, which meant the complete abolition of patronage, was never at any time recognised by the Scottish Parliament.

But through the seventeenth and eighteenth centuries the right of the congregation to have some voice in the appointment of a minister was asserted with varying success according to the attitude of the government of the day. It came to be the practice to present what was termed a Call to the minister. This was a document signed by the members of the congregation, signifying that they invited the person presented by the patron to be their minister, or at least that they concurred in the presentation made by the patron. It was a disputed question whether the existence of the Call was a *sine qua non* in the appointment of a minister, but, with the rise of the Evangelical Movement towards the end of the eighteenth century and the growth of democratic feeling which culminated in the passing of the great Reform Bill of 1832, the Call assumed an increasing importance in the settlement of a minister, and in 1834 the General Assembly of the Church passed an Act declaring that it was a fundamental law of the Church that no pastor should be intruded on any congregation contrary to the will of the people, and directing presbyteries that, if the majority of male heads of families, members of the congregation, should disapprove of the person presented by the patron, he should be rejected by the presbytery. This was the so-called Veto Act, which resulted in a great national controversy, ending in the historic Disruption of 1843 in which some hundreds of ministers and thousands of laity left the Established Church and founded the Free Church of Scotland.

Matters came to a head in the following way. The Earl of Kinnoull, as patron of the parish of Auchterarder in Perthshire, presented a Mr. Young to the vacant parish. Three persons signed the Call in his favour, one of them being the Earl's factor. Two hundred and eighty-seven heads of families dissented. The presbytery, applying the Veto Act, rejected Mr. Young, whereupon Lord Kinnoull and he raised an action in the Court of Session to have it declared that Young's rejection by the presbytery was illegal. The central question in this action was whether the Veto Act (which was an Act of the General Assembly) was an illegal infringement on the civil right of patronage. The judges of the Court of Session, by a majority, held that it was and that in making trial of a presentee the presbytery were not entitled to consider the question whether he was acceptable to the congregation. This judgment was affirmed by the House of Lords, the final court of appeal in civil matters.[1]

The judgment turned on the construction of a long series of Acts of Parliament, most of them Acts of the Scottish Parliament. It was common ground that a definite jurisdiction in ecclesiastical matters had been conferred by the State on the Church, and that the decisions of the Church within its proper province were not subject to review by the civil courts. The question was whether the General Assembly, in passing the Veto Act, had invaded the civil sphere so as to make its action subject to the jurisdiction of the civil courts. The majority judges held that in exercising its legislative power the General Assembly was like any other subordinate corporation in the State, and that its enactments were only legal in so far as they did not contravene the general law of the land. The general law of the land, so they held, had established a civil right of patronage which could not be nullified or adversely affected by a mere Act of Assembly, making it subject to the concurrence of the congregation. The minority judges, however, held on a construction of the Acts of Parliament, that Parliament had intended that the Church should have the supreme jurisdiction in ecclesiastical matters, and was therefore entitled to lay down the conditions under which the pastoral tie involving *cura animarum* should be constituted.

The case decided that the Assembly's Veto Act was illegal, but the controversy was far from ended. Another case arose in the presbytery of Strathbogie in which the presbytery, considering itself bound by this decision of the civil courts, ignored the provisions of the Veto Act. The Assembly promptly suspended the ministers concerned from the exercise of their ministerial functions, though not from the enjoyment of stipend or manse. The ministers in turn raised an action in the civil courts to annul the suspension pronounced by the Assembly. Here was a conflict of jurisdiction indeed. The presbytery were exposed to civil penalties and imprisonment if they complied with the Veto Act, and were threatened with ecclesiastical deprivation if they did not. Again the courts held that they had power to control the Assembly. This decision cut very deep, for in the question of patronage it could be argued that a civil right was involved; here it was a question whether the Church was entitled to exercise control over its own officers, acting in contumacious disregard of the orders of the Assembly, the supreme Court of the Church. The view of the minority judges—and they comprised the greatest lawyers then on the Bench—was that the Church Courts were supreme in their own sphere and that, like any other supreme judicature, they had to determine their own jurisdiction; that in cases near the borderline a conflict of jurisdiction might arise between them and the supreme civil court, just as it might arise between the supreme civil court and the supreme criminal court; and that in such a situation the remedy was not that the civil court should invade the ecclesiastical sphere and usurp a jurisdiction which it did not possess, but that the conflict of jurisdictions should be settled by Parliament, from which the jurisdiction of all the supreme courts in the realm, civil, criminal, and ecclesiastical ultimately flowed.

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[1] See Robertson's *Auchterarder Case* (*Earl of Kinnoul* v. *Presbytery of Auchterarder*), 2 Vols. 1838, with H.L. supplement 1839; *Earl of Kinnoull* v. *Fergusson*, 1841, 3 D. 778 and 1842; 1 Bell's App. 662; 1843 5 D 1010.

Deep as this decision cut, there was more to come. For the deposed majority of the presbytery, having been reponed by the Court of Session, proceeded to elect commissioners to the General Assembly. The minority—the only presbytery recognised by the Church—elected another set of commissioners. The majority then obtained an interdict against the minority commissioners, prohibiting them from sitting in the Assembly. This went very far, for the General Assembly was recognised by the law and constitution of the country as a representative body consisting of commissioners appointed by the various presbyteries, and in every such body, supreme within its own sphere (as the Assembly was admitted to be) there is inherently the exclusive right to determine the qualifications of its own members in a case of disputed election. These decisions followed the Stewarton case which decided that the Church, unless with the consent of the heritors, had no power to erect *quoad sacra* parishes or to admit their ministers as members of a presbytery. They showed that whatever might be conceded in theory there was in fact nothing left of the exclusive jurisdiction of the General Assembly in matters spiritual, and that ministers might be made or unmade by the civil courts. It was clear that these courts were prepared to review any decision of the Assembly on its merits and, if they thought fit, to reverse it. But if this were so, what of the Reformation doctrine that there were two kings and two kingdoms in Scotland?

The time had come for action. The majority of the then General Assembly were not prepared to accept the privileges of establishment at the price of such subjection to the civil power. After solemn but fruitless protest to the Government, they severed themselves from the Kirk, taking a large proportion of its members and many of its ministers with them, and founded the Free Church of Scotland, giving up the security of State connection and endowment, and relying entirely on the zeal and generosity of those who supported them. They did not rely in vain, for the Disruption of 1843 led to an immense quickening of the spiritual life of Scotland, the effects of which persisted for sixty or seventy years. It had also an immediate effect on the legislature, for in the following year Parliament passed an Act enlarging the powers of presbyteries to entertain objections against a presentee. Thirty years later, in 1874, patronage was abolished by Act of Parliament, and the position taken by John Knox in his *First Book of Discipline*, that the minister should be elected by the congregation, became the law and practice of the Kirk. On this issue there is no room for further conflict between Church and State.

I pass now to consider another source of conflict, the claim of the State to control the Church in matters of doctrine, a claim, by the way, which has been recently a burning question in Norway. Here again we must go back into history, but this time we are concerned not with the Established Church but with the Free Church, the origin of which I have just described. The name by which it chose to be known, and the manifestos and declarations issued at the time of its foundation, indicate that it regarded itself as the Church of Scotland, free indeed from the control of the State in matters spiritual, and in particular free from patronage, but otherwise identical with the historic Church of Scotland which came into being when the ancient church in Scotland was " reformed from popery by presbyters." The Free Church had to depend necessarily on the voluntary offerings of its members, but like the Church of Scotland from which it had seceded it continued to hold that it was the right and, indeed, the duty of the State to establish a Church and to endow it from national resources. It thereby differed from another Church in Scotland, the United Presbyterian Church, a union composed of several bodies which had seceded from the Church of Scotland in the eighteenth century. The Free Church held that she might lawfully accept aid from the civil power, so long as her spiritual independence was preserved entire. The United Presbyterian Church held that as Christ had enjoined upon his people to provide for His Church by their free-will offerings, the aid of the State was thereby excluded. The Free Church stood for the State connection, provided spiritual freedom was assured; the United Presbyterian Church stood for disestablishment and disendowment.

As the nineteenth century drew on these two churches came closer together. Both were in fact dependent on the free-will offerings of their members, and in course of time the Free Church proclaimed with diminishing emphasis the doctrine, which she had maintained at the Disruption, that it was the right and duty of government to " maintain and support an establishment of religion in accordance with God's Word." After many years of negotiation the two

Churches united in 1900 to form the United Free Church. The United Presbyterians were unanimously in favour of the union. In the Free Church twenty-four ministers out of 1,100, and a number of laymen, most of them living in the Highlands, refused to enter the union. This small minority, which came to be known as the Wee Frees, brought an action against the General Assembly of the United Church and the general trustees holding its property. In this action the Court of Session was asked to declare that the property formerly belonging to the Free Church could not be lawfully diverted to the use of any other association of Christians, such as the United Presbyterians, which did not maintain the whole fundamental principles embodied in the constitution of the Free Church, especially the principle of establishment. The minority contended that the union of the Churches effected such an unlawful diversion of property, and that in the circumstances they were entitled to the whole property of the Free Church, amounting at the then value of money to more than £1,000,000. The action thus raised two questions: (1) whether the union with the United Presbyterians contravened a fundamental doctrine of the Free Church, and (2) whether the Free Church had any power to change its original doctrines.

The Wee Frees maintained three arguments:—

First, that while the fundamental principle of the Free Church was that there was no other Head of the Church but the Lord Jesus Christ, the establishment principle was also one of its essential tenets. That principle meant that it was both the right and the duty of the State to maintain and support the Church. The funds of the Free Church had been originally subscribed on that footing, and were held in trust for the Free Church as originally constituted. It was therefore a breach of trust to divert those funds to a union in which one of the parties expressly denied the establishment principle since money given for one purpose could not lawfully be devoted to another and, indeed, to an opposite purpose. This was the argument which ultimately prevailed.

Second, it was argued that whereas the Free Church had without qualification adopted the Westminster Confession of Faith in 1646, the United Church had qualified, and in part discarded, the Confession in respect of the doctrine of predestination.

Third, it was maintained that the Free Church, having the same constitution as the Church of Scotland, had no power to make these changes in essential matters.

To these arguments the United Church replied that the establishment principle was not essential to the constitution of the Free Church, that they had not discarded but merely interpreted the Westminster Confession, which they were entitled to do, and that in any event the Church, being free from State aid and State control, had absolute legislative power over its doctrines, discipline, and government.

In the Scottish courts all the judges were unanimously in favour of the United Free Church, but on appeal to the House of Lords the decision was reversed and judgment was given in favour of the Wee Frees by a majority of five to two. I remember as a small boy the sense of consternation which this decision caused in Scotland. It meant that properties of great value were adjudged to a mere handful of dissenters and that in the teeth of the unanimous decision of the Scottish courts. Moreover, the House of Lords had two hearings of the case. The first hearing was before six judges. It was rumoured that at the hearing in the House of Lords three were in favour of the United Church, three in favour of the Wee Frees. But one of the judges said to be in favour of the United Church died before signing his judgment and the case was heard again before another bench of judges, with the result I have mentioned.

The feeling in the country was so great that a Royal Commission was set up, and, following on its report, a commission was established by Act of Parliament to allocate the properties of the Free Church between the Wee Frees and the United Church in such manner as might seem fair and equitable, having regard to local circumstances, the Wee Frees being entitled to the property where they formed one-third of the pre-union congregation. The property so allocated to the United Church was to be held according to its constitution as drawn up at the union. This meant that, so far as the future was concerned, the property would no longer be held on the condition that the establishment principle was accepted and the Westminster Confession adopted without qualification. It meant also that the property would be held by a church which had power to legislate in matters of doctrine.

The Established Church of Scotland was not directly concerned with this famous litigation. But the principles of the decision and the statutes or rules of law on which they were based applied to that Church with greater force than they did to the Free Church. Accordingly, when negotiations took place with a view to a union between the Church of Scotland and the United Free Church, it behoved the Church of Scotland to set her house in order so as to ensure that the principle of trust law, which the House of Lords had enforced against the United Free Church, would not also be applied to her. This was done in the following way. A number of Declaratory Articles were drawn up by the General Assembly setting forth the constitution of the Church of Scotland in matters spiritual. These were then embodied in an Act of Parliament which declared them to be lawful. The Act also provided that " no limitations of the liberty, rights, and powers therein set forth shall be derived from any statute or law affecting the Church of Scotland at present in force, it being hereby declared that in any question of construction the Declaratory Articles shall prevail and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect." In this way the fetters of the past were broken by Act of Parliament.

The Fourth of those Articles recognised as lawful by Parliament reads as follows: "This Church as part of the Universal Church, wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power, subject to no civil authority, to legislate and to adjudicate finally in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its courts and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church above, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction."

The Fifth Article reads: "This Church has the inherent right, free from interference by civil authority but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith."

These Articles, one may hope, constitute the final chapter in the long controversy between Church and State in Scotland. They define in clear terms the spiritual jurisdiction as claimed by the Church and recognised by the State, and they declare the right of the Church, within wide limits, to legislate and adjudicate finally on all matters of doctrine, worship, and government. No doubt the legislative power is not absolute, for the Church in terms of the First and Second Articles is a Christian Church, a Protestant Church, and a Presbyterian Church. The legislative power, however widely expressed, would not be held in law to authorise any Assembly, under colour of legislation, to destroy the Church which it was appointed to preserve, and if that were to be attempted, I do not doubt that the Assembly could still be restrained by process of law. But so far as its formularies and subordinate standards are concerned, the Church is given ample power of interpretation, " but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the Confession of which agreement the Church shall be the sole judge."

This Act was passed in 1921. It came into effect in 1926 and in 1929 the union took place between the Church of Scotland and the United Free Church upon the basis of the Declaratory Articles and the parallel, though not identical, declaration of the United Free Church made in 1906 after the decision of the House of Lords. Its effect is to make the reunited Church of Scotland as free from State interference as any Church can well be.

It may be asked: In what sense is the Church of Scotland established? What remains of the establishment? These points may be mentioned.

First. The Acts of the Scots Parliament establishing the Kirk still stand in the Statute Book. The judicatures of the Kirk in Kirk Sessions, Presbyteries, Synods, and General Assemblies are accordingly courts of the realm like the Court of Session, and the civil courts are bound to give them all due assistance in making their orders effectual. They differ, therefore, from the assemblies of dissenting Churches which, in the eyes of the law, are but voluntary associations, tolerated by law, whose jurisdiction—if it may be so called—depends not on statute but on contract, like the jurisdiction which parties may agree to confer on an arbiter. It follows (1) that the civil courts cannot review the decisions of the judicatories of the Kirk on matters properly within their jurisdiction, and (2) that ministers of the Kirk hold a public office from which they cannot be removed except for serious misconduct established in regular judicial proceedings taken in the courts of the Kirk. In this they differ materially from ministers of other Churches whose tenure depends not on their status as public officers but on their rights as parties to a private contract. In the case of these others ministers it is, of course, possible to frame the contract in such a way as to confer on them some at least of the rights which belong to ministers of the Kirk as matters of status.

Second. There remains the protection given by the Treaty of Union in 1707. The statute ratifying the Treaty enacted that " the true Protestant religion as in the Westminster Confession of Faith, the form and purity of worship presently in use in the Church and its Presbyterian government and discipline, that is to say, the government of the Church by Kirk Sessions, Presbyteries, Provincial Synods and General Assemblies shall remain and continue unalterable." This was written into the Treaty of Union as a fundamental essential and perpetual condition. It was further provided that every succeeding sovereign " shall in all time coming at his or her accession to the Crown swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion with the government worship discipline rights and privileges of this Church as above established by the laws of this kingdom." In conformity with this provision our present Queen took the requisite oath on her accession to the throne.

Third. The Church retains its historic patrimony of Church buildings, manses, glebes, and the right to the teinds, now for the most part commuted to an annual payment of money based on the average price of grain between 1873 and 1922. This commutation, it may be remarked, has turned out to be a very bad bargain for the Church in view of the subsequent rise in the price of grain and fall in the value of money.

Fourth. The Church in its Declaratory Articles "acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish in Scotland through a territorial ministry." It no longer claims that it is the right and duty of the civil power to maintain and support the Church, but it "acknowledges (Art. VI) the divine appointment and authority of the civil magistrate within his own sphere, and maintains its historic testimony to the duty of the nation, acting in its corporate capacity, to render homage to God, to acknowledge the Lord Jesus Christ to be King over the nations, to obey His laws, to reverence His ordinances, to honour His Church and to promote in all appropriate ways the Kingdom of God. The Church and the State have the right to determine, each for itself, all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and the obligations arising therefrom." Thus on occasions of national or civic thanksgiving or dedication, such as that held after the Coronation in St. Giles Cathedral, Edinburgh, it is the Church of Scotland, as the national Church, which arranges the service.

Fifth. At each meeting of the General Assembly the Lord High Commissioner, *i.e.*, the commissioner of the Sovereign, is present, attended by one of the Law Officers of the Crown in Scotland. Symbolically he sits in a gallery, not in the Assembly itself. He presents to the Assembly his royal commission given under the Crown Seal for Scotland and bearing that the Queen authorises him to be her representative. He delivers to the Assembly a letter from the Queen in which she gives assurance of her affectionate regard, support, and trust, and he himself addresses the

Assembly at the beginning and at the end of its proceedings. But the Crown has no right to convene the Assembly.

Sixth. The Moderator of the General Assembly during his term of office takes precedence in Scotland next after the Lord Chancellor of Great Britain and before all the nobility.

I have tried to present to you today a picture of Church and State in Scotland seen through the eyes of a lawyer who was brought up in the Free Church tradition and is now a member and elder of the Church of Scotland. None of us can foresee the future and it may be that in time to come disputes may arise again as to the respective jurisdictions of Church and State. But so far as the historic controversies are concerned, it would seem that they are now dead and buried, and that the Scottish Kirk is an example of a thing that is rare, if not unique, in Christendom, a Church that is both established and free.

T. M. TAYLOR.

BARE PROMISE IN SCOTS LAW

THE word " promise " is used in Scots law in a number of different meanings. Thus it may indicate no more than an offer which is not, and is not intended to be, obligatory on the promisor until made a contract by the acceptance of the offeree. In another sense " promise " is used of an obligation which arises from the promise of the promisor alone, unilateral in that the promisor is the sole party,[1] but which nevertheless can, if necessary, be sued on by the promisee. Such " nude " or " bare " promise may take the form of an undertaking by the promisor to give or do, or not to do, something. There is an obvious doubt as to whether or not such a promise is any form of contract.

It is in this second sense that the present writer wishes to consider promise, and throughout this article the word " promise " will be used as so meaning.

The promise is in most cases gratuitous (it must be remembered that for nearly four hundred years it has been settled that consideration in its English sense is not a requisite of the Scots law of contract), but it is not necessarily so.

In England a promise is regularly either the acceptance of an offer or an offer accepted.[2] Pollock mentions the apparently anomalous position of a promise embodied in a deed, the deed being irrevocable and binding on the promisor on delivery by the promisor and before acceptance by the promisee. He explains that this is due to the peculiar nature of the deed in English law. The party who seals and delivers a deed does not thereby create an obligation, but declares himself bound and is estopped from disputing his liability. Not the promise but the deed is irrevocable. The same idea is, of course, found in Roman law, where in certain circumstances a memorandum (*cautio*) alleging a *stipulatio* was conclusive, though in fact such *stipulatio* might never have been made.[3]

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[1] Throughout this article "unilateral obligation" is used in the sense of an obligation to which there is only one party.

[2] Pollock, *Contracts*, 13th ed. (1950), p. 6.

In our law promise occurs in one of three forms—

(*a*) It may be a gratuitous unilateral obligation—the commonest use. The promisor alone comes under obligation, the promisee need not be present at the time of the promise, nor know of it, and no set form is required for the constitution of the obligation.[4]

(*b*) It may be an onerous unilateral obligation, for instance most bonds of annuity.

(*c*) It may be a mutual contract in which the party promisor alone comes under obligation, and the party promisee need take no benefit, but the promisor undertakes to do something for an extra-contractual third party promisee (either in addition to, or to the exclusion of the party promisee[5]), such third party not necessarily being present nor knowing of the promise. The third party promisee is then said to have a *jus quaesitum tertio*, provided he can, according to established rules, prove that the intention of the parties was to benefit him.[6]

We find also mutual contracts only one party to which comes under any obligation, and only the other takes any benefit, *i.e.*, contracts without consideration in the English sense. Such mutual contracts our laws construe as gratuitous promises (the importance of this being some limitations of proof after-mentioned) if there were in them no stipulation prestable against the promisee at the time when the promise was made.[7] These contracts, being mutual, are of course outside the province of this article.

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[3] Buckland, *Textbook of Roman Law*, 2nd ed. (1931), p. 436; Barry Nicholas, (1953) 69 L.Q.R. at p. 257.

[4] This would seem to conflict with views expressed by Professor T. B. Smith that a promise is a consensual obligation (1956 J.R. 16) and that acceptance is required (*The British Commonwealth: The Development of its Laws and Constitutions, I* (*Scotland*), p. 978). He has, however, authorised the present writer to say that he is satisfied that a promise is constituted by a unilateral declaration of will without acceptance.

[5] *Lamont* v. *Burnett* (1901) 3 F. 797; 9 S.L.T. 39; Smith 1956 J.R. 7.

[6] See Smith. Generally I agree with his views. Where he says (p. 14, n. 34) that "in Scots law the right of the *tertius* against the promisor undoubtedly arises *consensu*," he is simply emphasising that the right is contractual as opposed to one arising from donation. There is, of course, no need for consent of the *tertius*.

In considering the juristic nature of promise, the first point of difficulty is whether the right so created arises from contract or otherwise from obligation. If indeed there is a contract, there is no question of the promisee being a party to it. As Lord Normand has put it,[8] "the [promisor's] act of will creates the obligation and confers the right which is actionable [the principle of Scots law that there is no right without a remedy in law being thus admitted]. All that is required is the deliberate intention to bestow the benefit on the promisee."

There are specialties as to how that intention can be proved, but that aspect has been covered by others, and it is not the purpose of the present writer to go into them beyond the mere mention of the fact that proof is limited to the writ or oath of the promisor.

Our main source of early information on promise is Stair's *Institutions* (1681). He makes a distinction[9] between "promise, pollicitation or offer, paction and contract." In the case of an offer (which he has coupled with pollicitation[10]) there is, he says, "implied a condition, that before it becomes obligatory, the party in whom it is made must accept." Dealing with promise in the following section[11] Stair contrasts it with offer, saying that it is "simple and pure, and hath not implied in it as a condition the acceptance of another." He goes on to point out that Grotius disagrees on this question of acceptance[12] and then adds "Promises are now commonly held obligatory, the canon law hath taken off the exception of the civil law, *de*

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[7] "Consideration in the Law of Scotland," Lord Normand (1939) 55 L.Q.R. 358, 363.

[8] *Ibid.*, p. 361.

[9] I.10.3.

[10] I disagree with Smith, 1956 J.R. 15, when he says that a promise in Scots law is a "pollicitation as contrasted with an offer."

[11] I.10.4.

[12] *De Jure Belli*, I.2. c.ii, s. 114.

nudo pacto. It is true, if he in whose favour they are made accept not, they become void, not by the negative non-acceptance, but by the contrary rejection. For as the will of the promiser constitutes a right in the other, so the other's will, by renouncing and rejecting that right, voids it and makes it return."

It is quite clear that Stair took the view that the obligation arose at the moment of promise, by the act of the promisor alone, and without need for acceptance. It seems too, particularly from his reference to the *nudum pactum*, that he regarded the obligation as contractual, enforceable as such by the promisee though he was in no sense a party to the contract. "This quadrates with the nature of a right, which consists in a faculty or power which may be in these, who exercise no act of will about it, nor know of it; so infants truly have right as well as men, though they do not know, nor cannot exerce it . . . The promise obliges the conscience and honesty of the promiser." [13]

In the immediately following section [14] Stair deals with promises made in favour of a third party, giving rise to a *jus quaesitum tertio.* "It is likewise the opinion of Molina, and it quadrates with our customs, that when parties contract . . . if there be any article in favour of a third party, at any time, *est jus quaesitum tertio* . . . So a promise, though gratuitous, made in favour of a third party, that party albeit not present nor accepting, was found to have right thereby . . ." In view of what will be said later (pp. 145–146) it is important to note that Stair did not see any difference at all between a promise made to no one but for the benefit of some particular promisee, and a promise made to an individual (not the beneficiary promisee) in favour of a third party promisee. Attention too should be drawn to the fact that this section follows on that dealing with simple promises, and does not treat of the *jus*

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[13] Stair, I.10.4, *Stricto sensu*, perhaps the right created by promise should not be termed contractual; see *post*, pp. 145 and 148.

[14] I.10.5.

quaesitum tertio as anything out of the ordinary. Note too the use of the word " likewise " as linking the two sections.

The inference to be drawn from the passages quoted from Stair is surely that in his view promises were *pacta* strictly, *nuda pacta* in the sense of being unilateral, but enforceable as if contracts under the more equitable doctrine of the canon law, *in omnibus licitis pactum servetur.*[15] Stair tells us too[16] that a special statute of session of November 27, 1592, had acknowledged all pactions and promises as effectual. There is at least one case of an earlier date where a promise in favour of a third party was enforced.[17]

It is essential to bear in mind that Stair and other early lawyers did not use *nudum pactum* in the Roman law sense of a contract defective in form. They gave to it two quite separate meanings. Frequently it was used of a contract without consideration in the English sense—a gratuitous obligation, which might or might not be a unilateral promise. Sometimes, however, it is used to describe a unilateral (one-party) obligation, usually a promise and normally gratuitous.[18] Stair regards " promise " in the sense he gives it in I.10.4 (*ante*, p. 140) as a *nudum pactum.*[19]

Erskine deals with promise in both his *Principles* (published 1754) and his *Institutes* (published 1773). In the former[20] he says " a promise . . . does not require the acceptance of him to whom the promise is made." The learned editor of the 20th edition (Rankine, published 1903) refers to *Malcolm* v. *Campbell*,[21] where one finds[22] " I do not doubt that persons are able to bind and oblige themselves by unilateral obligation to do most acts . . . [So] a person may bind himself by a single document, to which he alone is a party, to dispone a house to another." None of the three judges had any doubts on the point.

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[15] " Pactions, contracts, covenants and agreements are synonymous terms "—Stair, I.10.10.

[16] I.10.7. *Cf.* Hope's *Major Practicks*, Stair Society, Vol. III, p. 98.

[17] *Wood* v. *Moncur*, (1591) Mor. 7719. Under a contract of excambion of lands it was promised that the tenants should not be removed. This was held enforceable by a tenant (third party promisee) against the promisor.

[18] *Deuchar* v. *Brown* (1672) Mor. 12386.

[19] " Let us enquire whether promises, or naked pactions, are morally obligatory "— I.10.10.

[20] III.2.1.

[21] (1891) 19 R. 278.

[22] p. 281, Lord Adam.

However in his *Institutes* [23] Erskine took another view. After narrating that Stair's opinion was that promises are effectual without acceptance, and that Grotius and Puffendorf thought that acceptance was required because no obligation can be formed without joint consent, he goes on to say: " acceptance, admitting that [24] it is necessary toward constituting an obligation, may be reasonably presumed without any formal act in pure and simple donations *which imply no burden upon the donee* [25]; and Stair's opinion is agreeable to our practice."

This passage from the *Institutes* is far from clear, and the present writer ventures the view that, taking into account Erskine's view as expressed in his *Principles*, what he meant to convey by the words immediately above quoted was that he was doubtful if acceptance was required for the constitution of an obligation where no burden was put on the promisee; but that the promisee could not be put under any obligation without his consent.

Bell in his *Principles* [26] says simply that a promise is " a unilateral engagement to which acceptance is presumed." As authority he cites Stair,[27] who says there exactly the contrary, and Erskine's *Institutes*,[28] which is at least doubtful.

Gloag [29] deals with promise under contract. He takes the view that it is a contract constituted by offer and acceptance, saying [30] " Both [promise and offer] in order to amount to a contract, require acceptance . . . but where a promise is made its acceptance is sufficiently indicated by a demand for fulfilment . . . A promise, it may be said, creates an obligation subject to a resolutive condition; it is binding until it is refused." As authority Gloag cites, first, Stair, I.10.3, a passage which is quite off the point—the gist of it is given *ante*, p. 140. Secondly he cites Erskine's *Institutes*, III.88, already commented on. Thirdly he refers to the case of *Ferguson* v. *Paterson*,[31] and that seems to give no support to the proposition. In it it was held that a written promise to dispone land was binding on the promisor. There was no argument on the necessity for acceptance if the document was construed as a promise; the point at issue was whether it was an offer or a promise. The judgment did no more than find the promisor bound by his missive promise.

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[23] III.88.

[24] Does this mean " if "?

[25] The present writer's italics.

[26] 9.

[27] I.10.4. *Ante*, p. 140.

[28] III.88.

[29] *Contract*, 2nd ed. (1929), p. 16.

[30] p. 24.

Much later [32] Gloag refers also to *Malcolm* v. *Campbell*,[33] where he is dealing with the necessity for writing in certain contracts, saying "It is recognised that it is possible to enter into a binding unilateral obligation to buy or sell land if required . . . [and such obligation] may be binding without any written acceptance." Unless the inference from "written" is that at least a verbal acceptance is required (and I do not think Gloag so intended) to some extent this qualifies Gloag's earlier remarks. In any case the *dicta* of the judges in *Malcolm* v. *Campbell* are not limited to promises relating to land.

Gloag and Henderson do not touch on the need of acceptance but they do seem to regard promise as a contract—probably we should take it that their views are the same as Gloag's.

More recent is Lord Normand's article on "Consideration," previously referred to.[34] He does not deal directly with promise as a contract, so we must not give too much weight to his *dicta* on the matter, but he certainly seems to view it as such. So, after writing of contracts requiring certain formalities, he adds: "but of other *contracts* [35] it can only be said that the granter's act of will creates the obligation and confers the right which is actionable . . . All that is required is the deliberate intention to bestow the benefit on the promisee." [36]

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[31] (1748) Mor. 8440.

[32] p. 166.

[33] (1891) 19 R. 278; *ante*, p. 142.

[34] p. 140.

Professor Smith [37] and the present writer both take the view that a promise arises from a unilateral declaration of will and does not require acceptance.

There is, then, no doubt that the promisee does have a right to sue in Scots law, and has had it for approaching four centuries. Most of our writers who have expressed an opinion consider that right a contractual one—Stair as a *nudum pactum*,[38] Erskine in his *Institutes* perhaps as a contract requiring acceptance, and Bell and Gloag as a contract requiring acceptance, both these last on insufficient and sometimes irrelevant grounds.

If we take the view that promise alone and without acceptance gives rise to an obligation, and if we accept the general understanding that a contract requires at least two parties, it is wrong to term a promise a contract. Nevertheless, since it is an obligation arising from the expressed will of the obliged, and since the promisee can enforce the obligation in the same way as if it had been contained in a contract to which he was a party, and seeing that our main authority, Stair, so thought of it, and that our later writers, wrongly maybe, have dealt with it in works on contract, convenience has perhaps properly overridden strict logic.[39]

Before concluding the discussion of the Scots law something more must be said on promise for the benefit of a third party (*jus quaesitum tertio*), previously referred to.[40] Our modern writers, except Smith, who draws attention to the fact that Stair apparently regards it as no more than promise and indeed the leading example of it, have treated the position of a party who has a *jus quaesitum tertio* as rather special in the law of contract, and have not realised that he is simply a promisee with the normal rights of such. So Gloag [41] and Gloag and Henderson [42] write of him as the most important of the few exceptional cases in which a person who is not a party to a contract may have a right to sue on it, though they do not deal with the simple promisee as such an exceptional case.

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[35] The present writer's italics.

[36] (1939) 55 L.Q.R. at p. 361.

[37] *Ante*, p. 139, note 4.

[38] *Ante*, p. 141.

[39] For a South African view see *post*, p. 148.

[40] pp. 139 and 141.

A good deal of attention and space has been devoted to discussing in what circumstances a *jus quaesitum tertio* arises. It is, of course, important to know if and when the *tertius* can sue, but the present writer suggests that the reason for the special rules which have been evolved over the centuries and by which we now determine whether C has a right to sue B on a promise made by B to A is not that the contract itself is special but that it is essential fully to protect the interests of A, the party promisee. Since A, the person to whom the promise has actually been made by B, and who, therefore, has the *prima facie* right of action, is to be displaced as pursuer by C, for whose benefit that promise was expressed, C should obviously be under a somewhat heavy burden of proof of the serious, final and irrevocable intention of A and B to confer upon C the right to sue B, more than ever if A disputes that right.[43] It follows from the foregoing that the present writer regards promise for the benefit of a third party not as an exception to our law of contract but as a particular application of our rules relating to promise—as it was regarded by Stair.

It is not without interest to go a little into Roman law, Canon law and Roman-Dutch law.

First as regards Roman law. There is some slight authority for allowing actions on pollicitations. They seem as a general rule to have been regarded as no more than an offer in a mutual pact, and are so described in the *Digest*.[44] In two cases, however, an action on pollicitations was allowed, if the promise was made with a view to receiving a public honour (*ob honorem*) or if, without such motive, the promisor had promised to do a public work, and had started it, or even where no such work had been started if a fixed sum of money had been promised. Buckland [45] says that in these cases pollicitations have usually been held to be unilateral in the sense that the offer was irrevocable even before acceptance. Similarly a person who had vowed something was bound by his vow.[46] This last was obsolete in classical law.[45] There is no case of unilateral pollicitation in favour of a private individual.[47]

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[41] pp. 234 *et seq.*

[42] *Introduction to the Law of Scotland*, 6th ed. (1956), p. 90.

[43] "The fundamental question . . . is . . . Did the contracting parties intend to confer a title to sue on a third party?" (Smith 1956 J.R. 20). Sometimes both A and C can sue B—*ante*, p. 139.

In Canon law it was controversial whether a promise under oath gave an action, but it was allowed by the *Denunciatio Evangelica* procedure.[48]

As to Roman-Dutch law, Grotius in his *Inleiding* [49] says that a promise which is not accepted confers no right; but promises made in God's honour are deemed in law to be accepted contracts. In his *Commentary* Lee says " *semble* the Roman *pollicitatio* is unknown to the modern law." [50]

The view of the modern Roman-Dutch authorities seems to be unanimous that there must be two parties to a contract.[51] Writing of vows and pollicitations as these " self-imposed legal obligations " Wessels [52] has said that " in order to justify the universal truth of the statement that there must be two parties to a contract, some have urged that . . . the priests . . . and the *municipium* . . . should be regarded as a second party." He rejects this as somewhat strained, and suggests that the true view is that they are *sui generis* and have no connection with the law of contract. The learned editor of the second edition has added a footnote to the effect that in his view and Lee's such vows and promises form no part of Roman-Dutch law. In his *Introduction to Roman-Dutch Law* Lee has said [53] that he doubts if they are true of modern law.

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[44] D. 50.12.3.

[45] *Textbook of Roman Law*, p. 457, note 11.

[46] D. 50.12.2.

[47] The present writer has had the benefit of discussing *pollicitatio* with Professor Duff, of the University of Cambridge, and has his permission to say that he agrees with this statement of the Roman law.

[48] Dr. H. Coing, " English Equity and the *Denunciatio Evangelica* of the Canon Law," (1955) 71 L.Q.R. 223, 234.

[49] III.1.48.

[50] R. W. Lee, translation of Grotius *Inleiding*, Vol. II (*Commentary*), p. 230.

[51] Wessels, *Law of Contract in South Africa*, 2nd ed. (1951), I. 1; Lee and Honoré, *The South African Law of Obligations* (1950), p. 33; Wille, *Principles of South African Law*, 4th ed. (1956), p. 293.

[52] *Ibid.*, I. 56.

Second, as to promise for the benefit of a third party (*stipulatio alteri*). In Roman law this was unknown. It was, however, accepted by the Canon law, as we have seen from the passage quoted from Molina.[54] Grotius in his *Inleiding* [55] states the law as follows " . . . A third person [C] may accept the promise [of B to A that B will do something for C] and thus acquire a right, unless the promisor revokes the promise before such acceptance." This has been followed in the South African courts.[56] There seems to be no doubt, says the learned editor of the second edition of Wessels, " that contracts for the benefit of third parties form part of our present day law ; but that in insisting on the need for acceptance [the courts] have confused the two ideas [of agency and contracts for the benefit of third parties]. The result is that our so-called contract for the benefit of a third party where A and B agree that A shall give or do something for C, is in the first instance enforceable by B and can be cancelled and varied by agreement between A and B only . . . but there is a term inherent in the contract that if and when C accepts . . . he acquires the right to enforce performance." [57]

Just what C is to accept has never been clear, whether it is an offer by the promisee or promisor.[58] Grotius, in saying that the third party must "accept the promise," presumably had in mind acceptance to the promisor. Anyhow, whatever "acceptance" or "acceptance of the benefits" may mean, and to whomsoever such acceptance is to be made, there is little doubt that all that is required is notification by the third party to the promisor.[59]

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[53] 5th ed. (1953), p. 211.

[54] *Ante*, p. 141.

[55] Lee's translation, III.3.38.

[56] Wessels, *op. cit.*, I. 1753 and notes.

[57] This view has been recently settled in Crookes, *N.O. and Anr.* v. *Watson and Ors.*, 1956 (1) S.A. 277. Note that consideration in the English sense is not required in Roman-Dutch law.

[58] See Dold, *Stipulations for a Third Party* (1948) at pp. 114 *et seq.*

Thus the difference between the Roman-Dutch *stipulatio alteri* and the Scottish *jus quaesitum tertio* lies in the need of acceptance. This difference is, of course, perfectly logical. Scots law does not, it is submitted, require acceptance of promises, Roman-Dutch law does; and in both countries the rule is not changed when and because the promise is made for the benefit of a third party.

To summarise the position in Scots law as the present writer sees it—

I. A promise may be created—

(*a*) By unilateral "contract," an obligation created by the act of B (promisor) alone, who promises something for the benefit of A (promisee). A's acceptance is not required, but he may reject. A sues not as a party but as beneficiary named and intended.

(*b*) By a mutual contract between B and A expressed to be for the benefit of C, a third party promisee. C has a *jus quaesitum tertio* but is not a party to the contract. He sues as beneficiary named and intended.

II. The promise may be onerous or gratuitous.

III. It may be wrong terminologically to describe the unilateral obligation as a contract, but at least the mistake, if any, is of long standing and convenient.

IV. The specialty of the promise for the benefit of a third party (*jus quaesitum tertio*) has been overstated. It is special, not as an obligation or contract but in the burden of proof.

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[59] "The typical contract for the benefit of a third person is one where A [promisor] and B [stipulator] make a contract in order that C may be enabled by notifying A to become a party to a contract between himself and A" (Schreiner, J. A., in Crookes at p. 291).

V. Even though there is some slight basis in Roman law on which Scots law might have founded its enforcement of promises it did not choose so to do, preferring its own version of the Canon law.

VI. The *stipulatio alteri* of Roman-Dutch law being based on a conception radically different from that of the Scots promise for the benefit of a third party is not truly comparable.

D. I. C. Ashton Cross.

LEGAL STUDIES IN THE SCOTTISH UNIVERSITIES

(*Continued from p.* 41)

The function of legal study in a university

No apology is offered for going back to this fundamental matter because unless it is kept clearly in view the whole purpose of the Faculties of Law tends to be forgotten. Bruce Truscot [17] described a university as " a corporation or society which devotes itself to a search after knowledge for the sake of its intrinsic value." Subsidiary to the essential function of the search after knowledge is the dissemination of knowledge, so that the teaching function is a natural development from the essential idea of a university, from which in turn is derived the desirability of testing those instructed, to give them a status which is a guarantee of their competence and fitness to pursue their studies further and in turn to instruct others.[18] The fundamental nature of this problem, the definition of the aims and objects of law teaching, and hence the determination of its nature and content, is stressed in a recent valuable UNESCO publication.[19] This report, based on the practice of many countries, considers the two possible types of law teaching: that with purely practical or professional ends and that with, in addition, theoretical or scientific purposes. The conclusion [20] is that " Law teaching must necessarily be designed to convey an understanding of law in its totality, in all its aspects. It must aim and tend to cover every kind of problem relating to law. To maintain that the teaching of law can confine itself to purely practical objectives is to agree to its providing merely a truncated and deformed knowledge of its subject, to its treating law as solely something to be 'practised,' that would be to rule out, from the start, consideration of a whole section of the problems it involves. Teaching such as that could only be of limited intellectual value . . . Teaching for purely practical purposes is not university teaching in the true sense . . . We thus entirely agree with those who maintain that the instruction provided in faculties of law should be 'cultural' or 'general' in nature, not 'utilitarian' or 'professional.'"

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[17] Redbrick University (Pelican edn.) 65.

[18] *Ibid.*, pp. 68–70.

[19] *The University Teaching of the Social Sciences: Law.* A report prepared by Professor Charles Eisenmann of Paris for the International Committee of Comparative Law. (UNESCO 1954).

[20] pp. 56–7.

The United Kingdom national report contributed for this report is also worth quoting[21]: "It must be remembered at the outset that the object of university training is not that of the professional law school, for law is taught in the universities 'not as an exercise in professional technique, but in relation to the place in the world in which we live'[22] . . . The object of university teaching is to show how legal rules have developed, and what are the reasons and principles underlying them, to reveal the connexion between legal and social history and if possible to indicate the correct channel for future development.[23] Perhaps this ideal purpose is not always attained, but it is the atmosphere in which we must consider the actual methods of the universities."

Further examples of similar dicta can readily be multiplied.[23a] Thus Stallybrass[24] said, "a university education should be education in the law and not only, or possibly not even primarily, for the law." The Normand Committee wrote[25] "The true purpose of a Law Faculty is to study and teach the law which it professes in the same spirit and with the same ideals as those which inspire the Arts Faculty or the Faculty of Science. It must aim at stimulating or awakening in the student an intellectual interest in the law, a desire not only to learn what is easily accessible, but to extend the bounds of knowledge, and beyond that a disposition to be alert in promoting the wise development and improvement of the law. It is therefore not enough to present to the student the opportunity of learning, however completely, the system of law which prevails in Scotland today. The origins of our law, the history of its growth, its special characteristics in contrast with the other great systems of law, the direction of present tendencies towards the reform of the law, are all essential subjects of enquiry and study."

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[21] *Ibid.*, p. 95.

[22] Quotation from Professor E. C. S. Wade's inaugural lecture, (1947) 9 Camb.L.J. 286.

[23] This sentence is based on Lord Justice Denning's address "The Universities and Legal Reform," reprinted in (1949) 1 J.S.P.T.L. (N.S.) 258.

[23a] See further Hughes Parry, "Some Reflections on Legal Education" (1949) 1 J.S.P.T.L. (N.S.) 249; Wade, "Legal Education; the Changing Scene," *ibid.* 415. And for comparison of the Scottish position with that in other countries see Larkin, "Law Teachers and Law Teaching in Canada" (1954) 2 J.S.P.T.L. (N.S.) 115; Symposium on Legal Education (1955) 3 J.S.P.T.L. (N.S.) 74; Shatwell, "Legal Education in Australia," *ibid.* 133.

[24] "Law in the Universities" (1948) 1 J.S.P.L.T. (N.S.) 157, 160.

[25] Report, p. 3.

It does not follow that the rôles of the universities and of professional law schools are wholly different and that the universities should teach law to intending lawyers and others purely as a branch of the social science group of knowledge and wholly ignore practical considerations but rather that, so long as the profession in Scotland does nothing about the training of its own entrants and entrusts that function to the universities, the profession will tend to exercise pressure on the universities to be vocational and practical rather than scientific and academic. The essential point is that it is not the function of the university to give purely vocational training or expressly to prepare a student for professional examinations or for the practice of any profession.[26] In the particular sphere of law it is not the proper function of the university to turn out a stream of competent lawyers: its proper function is to study and teach law. Now the study of law is one of the social sciences, one facet of the study of human activity, that branch of the critical examination of the life of man in organised society which regards particularly the means worked out and utilised by individuals and groups and communities for regulating their conflicting claims and wants and desires, for delimiting their interests, and controlling their conduct by reference to overriding principles of justice. It studies the principles underlying those means, their history and development and rationale and the particular rules accepted and enforced in various political communities for effectuating those means. So too economics and politics and history and sociology and anthropology are other facets of this study of man, concentrating each on a different aspect of his activities in society. The fundamental failure of the Scottish universities at present is that they are partly, indeed largely, and sometimes one thinks exclusively, professional training schools. That is what is wrong with them. The students do not come to learn law: they come to be made into solicitors. " In law we wish to train lawyers and not mere clerks or scriveners . . . Whatever may be the function of a technical school it is not and never will be, the function of a university." [27]

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[26] *Cf.* Stallybrass, *loc. cit.* 160.

What is remarkable is that this broad and noble conception of university legal study has been mentioned in Scotland before. It is not something revolutionary. The Rosebery Commission reported in 1831,[28] " The real interests of the community may be most materially sacrificed if the course of study of law shall be adapted wholly to the supposed convenience of a portion of the students . . . it will be in vain to hope that the independence and character of the Bar can be maintained, if the study of Law is not conducted on an enlightened and philosophical plan.

" The great extension of the subject only renders it the more important to provide that the instruction of students shall not be limited to the details of a technical art, the philosophy and the science of law sacrificed, in order to furnish materials for the manual of a practitioner." That was right in 1831 and it is still right, but it has never yet been applied, and time after time only such changes have been made in Ordinances as could be made without sacrificing the principle of catering for the requirements of the professional bodies. That is why it is so profoundly disappointing that the new Ordinances made so little fundamental change. In 1943

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[27] Grant Robertson, " A Birmingham School of Law " (1924) 1 J.S.P.T.L. 22, 23.
[28] General Report, xii, 54.

Professor Gibb pleaded for a radical overhaul. This has not been done: the absurdity of the two bachelor's degrees, the now hopelessly idealistic insistence on an Arts degree as a preliminary to an LL.B., are both preserved; no provision has been made for higher courses or for taking the basic degree with Honours; and, worst of all, the part-time system of study continues unchecked and tacitly recognised by the Ordinances.

If such is the underlying purpose and function of the true university study of law, can a *modus vivendi* be established whereby the universities can perform that function without let or hindrance and yet enable the entrant to the practising profession to take advantage of university study, and also to obtain necessary practical training, all within a reasonable period of time? Such an expedient as insisting on a full-time M.A., LL.B. and then an apprenticeship is purely idealistic and unrelated to present conditions and need not be seriously considered.

The time-table of study

There is no doubt at all that ideally legal study in the proper sense, *i.e.*, study of legal science, not study purely for legal practice, should be pursued full-time. There is every bit as much Law to study in three or four years as in any Arts or Science course and it is quite as desirable and necessary that a student should give his whole attention to his studies in law as in any other faculty, but under the present system that is hardly ever done. Law is in general studied only on a part-time basis and law students are not truly students at all. This factor possibly more than any other contributes to the low level of legal scholarship in the Scottish universities. The normal student's time is occupied by two or three hours' lectures a day and the rest of his day is spent in the office. He does not have the opportunity, like other students, of spending several hours a day in the library. When allowance is made for travelling and meals the whole day is taken up by attendance at classes and at the office; not more than three or four hours remain out of the twenty-four and this is ridiculously inadequate for a student supposedly reading two or three subjects at a university.

The cause of this is the concurrent apprenticeship. Traditionally, and by reason of the length of the combined M.A., LL.B. courses, not to speak of National Service, this is done concurrently with the legal studies. The desirability or not of an apprenticeship is not a matter for the universities, but they have every reason to complain when its existence and length detract seriously, as they undoubtedly do now, from the time and attention which may be given to study, so that the courses are truncated and sketchy and in many cases quite inadequate.

The radical objection to part-time study-cum-apprenticeship is that the student does not and cannot devote full attention to either. As Gower says[29]: " it is doubtful whether any theoretical training, however long, can be combined with articles [Scoticè apprenticeship] without serious detriment to both " and he points out that the English requirement that the articled clerk must spend a compulsory year at law school is of very doubtful value. " It is not possible for a student to devote sufficient time to the academic study of law if he is in attendance in chambers for the greater part of the day. The result must be that, unless he has exceptional health or mental capacity, he can do little more than go over and correct in the evening the notes of lectures which he has taken during the day. He may not even be able to find time to read the cases cited in the lectures or to consult the institutional writers or the textbooks to which he has been referred by his professor. He does not learn how to make use of the law library and of the opportunities afforded by the debating societies or the social life of the university. This is a negation of a real student life, and the best that can be expected of it is a memorising of the lectures delivered without any real comprehension of the subject. Unless some change is made, and the student is liberated from attendance at office or chambers for a considerable part of his academic course, no reform of the curricula for degrees, or of the methods of teaching, will have their intended effect." [30] Yet this is precisely what has happened in the adoption of the 1954 Ordinances; the criticisms have again been ignored. Vocational requirements have triumphed again over academic considerations.

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[29] " English Legal Training," (1950) 13 M.L.R. 137, 152. *Cf.* also Smith (1955) 3 J.S.P.T.L. (N.S.) 84.

It is in any event likely that the value of the apprenticeship is enormously overrated. As a method of instruction it is medieval and many professions have abandoned it altogether.[31] But the legal profession generally still regards it as far more important than the university, which gives only the theory and not the "real" training. How far does an apprentice under modern conditions receive any "training" at all? The essential point for the present purpose is: Is this apprenticeship really so valuable as to justify stultifying a student's university training by *concurrent* study and office experience? Something no doubt can be done by the Law Society of Scotland to make sure that the apprenticeship is utilised to the best advantage, but something can also be done by the universities from their side to separate the two, and this would almost certainly be beneficial to both theoretical and practical sides.[31a]

The argument is of course frequently put forward that it is better, or indeed best, that theory and practice be taken concurrently, whereby each illumines the other and the student does not leave the college as a brilliant book-lawyer who has never seen a small-debt summons or a disposition or heard a witness examined or felt the tension as a jury returns to court to deliver its verdict. That may be true in theory. But to make that a reality it is necessary that the student should have a carefully balanced diet of practice, each bit related to the stage of theory he is learning, and each piece of practice properly explained to him. It also ignores the observed fact that in training theory underlies and logically precedes practice. It is significant that the present generation of students is in general bitterly critical of their apprenticeships; there is a strong feeling of discontent, and a feeling that much of the time is simply wasted. The only real value of the apprenticeship is the somewhat shadowy one that the student does have some opportunity to see the law in action and is not wholly confined to the law in books, and that he does pick up a good deal about how a legal office works, and he sees the inside of the courts. But a full-time student too could go and watch the courts at work.

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[30] Normand Committee Report, pp. 4–5.

[31] *Cf.* Beale, "The History of Legal Education," in *Law: A Century of Progress*, I, 104.

[31a] *Cf.* Smith, 3 J.S.P.T.L. (N.S.) 84: "Both theoretical and practical training are essential—but in that order. To attempt both theoretical and practical training simultaneously is to get the worst of both worlds."

The part-time system reacts on teaching too. It is futile to set part-time students weekly exercises or termly essays when it is perfectly obvious that they have not got the time to read for and compose these adequately, for they are only of value when the students do read and think and take time and care to compose what they hand in. Moreover the teacher is almost compelled to lecture his class at length, probably too much, because if there are no lectures on particular days, the students have to go to their offices then and do not, as they would if they were full-time students, have that much more time to read in the library. It is very significant how few students in the Law Faculty use the University Library or the Law Faculty Library, whereas owing to the voluminous necessary apparatus of digests, statutes and reports the library should be the heart of the university study of law every bit as much as in the study of any other social science. Furthermore, the organisation of the time-table consequent on the part-time system is such as to compress some subjects into one term and many into two terms. This again is highly undesirable because it takes several weeks for a student to grasp what the subject is about and by that time the course is possibly half done. It is of far more value to cover even the same ground over a full session, because then the student has time to assimilate the material and ponder over the difficulties, to read the relevant literature and cases; there have been two vacations in which to think about it or to read further (and for keen students the vacations are just as important as the terms; a great deal of steady work can be done in them, free from the attendance on classes and the need to read for examinations, still leaving ample time for recreation).

Now at present apprenticeship is compulsory for intending solicitors, five years for those who do not graduate, three years for those who have graduated before the end of the apprenticeship. It is not here suggested that it be done away with altogether, though the tendency in America has been that way. It would, however, be better for both the universities and the apprentices to have a much shorter period of *full-time* apprenticeship. Apprenticeship suffers at present from all the defects which Dicey [32] levelled against the learning of law purely in chambers; it is fragmentary, unsystematic, and wasteful of time and labour. It is also at present uncontrolled and undirected, though this is a matter at present engaging the attention of the Law Society of Scotland. In Gower's view,[33] "opinions will differ but my experience convinces me that two years is just sufficient provided that it is *full-time* and that it is *preceded* by three years' training in law at a university. An additional year would probably be ideal, but would involve an increase in the total period of training which . . . appears to be impracticable under present conditions." This seems valid for Scotland too.[34]

In considering this aspect of the problem no attention at all should be paid to any consequential difficulties in offices. Apprenticeship exists for the benefit of the apprentice and thereby for the good of the profession and the service of the public; it does not exist for the benefit of the master in the office and he must not allow his personal inconvenience to count, though that argument is regularly adduced. It is no argument at all that the absence of the apprentices from the offices would hold up work. The work is to be done by the qualified staff; the apprentices are there to learn and not to do work for which a client will be paying.

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[32] Inaugural lecture in 1883, entitled "Can English Law be taught at the Universities?", cited in 1 J.S.P.T.L. (N.S.) 252.

[33] *Op. cit.*, 165.

[34] So too in Canada the usual type of course is three years at law school, followed by nine to eighteen months under articles: Laskin, "Law Teachers and Law Teaching in Canada," (1953) 2 J.S.P.T.L. (N.S.) 115, 117.

The present part-time system is accordingly hopelessly unsound and the root cause of the lowly state of legal scholarship in Scotland. "The universities [in England] . . . fulfil a dual role; in part they teach law and examine it as a branch of knowledge for which they grant degrees; in addition most of them act as law schools for the professional bodies. The result is that they have tended to fall between two stools and to be in part schools of theoretical instruction and in part vocational training establishments. Quite rightly they try to subordinate the latter to the former. . . . But this is only practicable if their degree syllabuses cover roughly the same ground as those of the professional examinations; hence these tend to control the nature and scope of the academic courses."[35] In Scotland the universities are almost entirely the vocational training establishments of the profession and subordinate to its requirements.

Now it is manifest that under present conditions no changes which lengthen the time necessarily spent over a course need be seriously considered; five or six years is as much as any student can reasonably be required to spend on his basic studies and compulsory training; anything more must be entirely optional. Equally it must be remembered that at present, and almost certainly in the future too, a majority of students taking law in the Scottish universities will be doing so with a view to obtaining a professional qualification, and for such a qualification a period of practical training and experience will probably continue to be considered desirable and indeed necessary; but this is something which cannot and should not be given in the university. It follows that three or four years is as much as can be demanded for pure study. The existing M.A., LL.B., extending to at least five years, is therefore possible only so long as theory and practice are run in double harness for the last two or three years. Six years' study plus three years' apprenticeship, plus National Service at some stage, is a complete impossibility. Accordingly, either the requirement of a prerequisite M.A. must go, or concurrent apprenticeship must stay, and if the long course (*i.e.*, combined M.A., LL.B.) stays the demand for a shorter course will persist, resulting in a continuance of the B.L. It is patently best that the requirement of the M.A. should go, as this would permit the fusion of the two law degrees which on the 1954 Ordinances approximate quite closely in legal content, and also permit full-time study for at least the major part of the law course. This necessarily leads on to consideration of the justification for the dualism of law degrees.

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[35] Gower, *op. cit.*, 155.

The Two Degrees

What is the relation between the two degrees and what justification is there for maintaining this very peculiar and anomalous system of conferring two bachelor's degrees in one Faculty? It seems to be peculiar to Scotland and even in Scotland, outside academic circles and the legal profession, it is probable that the distinction between the two is not known or is improperly understood. Now in origin it is clear that the LL.B. was conceived as an academic distinction, a degree of Honours quality if not an Honours degree in form or in name, and the B.L. as a shorter, easier, more practical and less academic degree, primarily a practitioner's qualification. Whatever may have been the case in the past, there is now under the 1954 Ordinances but little distinction between the degrees in length, scope or standard; the only material distinctions are the prerequisite M.A. and the number of legal subjects, six as against eight. Students attend the same classes, hear the same lectures, and in general sit the same examinations. The 1911 B.L. Ordinance even provided that the standard of examination for B.L. and LL.B. candidates should be the same in subjects common to both degrees, and all subjects were actually so common.

In fact the distinction has come to be one of length rather than of quality and it is impossible to regard it as one between Honours and Ordinary. Some of the work of some of the LL.B. students is not of Honours quality, and in any event, if that is to be the nature of the distinction, it is high time the position were rationalised and the distinction converted into a more rational academic form. Conversely it is not at all unknown to have a B.L. student at the head of the class. " The situation may possess historical interest. It bears little relation to good sense. To begin with, in no other Faculty are there two bachelor's degrees of a first and a second rate order. Mere nomenclature apart altogether from the merits is at fault here. One bachelor's degree should remain and there seems to be no reason why it should not be that of Bachelor of Laws." [36]

It is clear that if the insistence on the M.A. as a prerequisite to the LL.B. disappears then the difference between the two degrees is now so small that no purpose is served by maintaining the duality. The only justification for it is this matter of the M.A. The conclusion must therefore be, as was suggested by Professor Gibb, that unless there are overwhelming reasons for the retention of the M.A. the two degrees should go and be replaced by a single bachelor's degree which, in conformity with general British academic practice, would be the LL.B. Are there any such overwhelming reasons? Moreover the time factor is involved here too. No university is likely to sanction a combined M.A., LL.B. obtainable on less than five years' work and twelve courses in all. The length of this virtually compels concurrent apprenticeship, and renders any extension of full-time study difficult of attainment.

The first reason for the two bachelor's degrees is purely historical. The Commissioners of 1858 established the LL.B. degree, requiring a prior M.A., following in this old, even medieval, practice. To stimulate the taking of degrees in Law, something shorter and easier of attainment had to be offered and hence the B.L. was devised. This reason now has no justification at all; there are now plenty of graduating students and the university is the normal way of entry to both branches of the profession. Moreover, apart from National Service, it must be remembered that students are now older when they come up to the university than in 1858. So long as the M.A., LL.B. is the standard degree, this demand for the shorter alternative course will persist.

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[36] Gibb, *op. cit.*, 153, and *cf.* also 160

The second suggested reason is that a student is not academically or educationally fitted to proceed to legal studies until he has undergone the preliminary training of an Arts degree. But this is patently unsound. For eighty years, rightly or wrongly, the Scottish universities have in fact allowed fully half of their graduating students, and in general too, the weaker vessels, to proceed direct to legal studies, by permitting the continuance of the B.L. Moreover, in British universities other than in Scotland, students may proceed directly to legal studies and take their first degree in law. Practice in other comparable countries varies, but it should be remembered that the B.A. demanded prior to entry to some of the best American law schools, *e.g.*, Harvard, (but not by any means to all) is no higher than a good-class matriculation qualification by our standards, and the students are younger and less well prepared generally.[37] As the Normand Committee reported, " A first degree, not preceded by a degree in Arts, is normal in universities of this country, and there is no reason to suppose that such a degree need be unsatisfactory either from the point of view of university standards or from the point of view of a professional qualification. What is, however, important is that a high standard shall be required from the candidates and that the curriculum shall be suitable to academic study and shall be followed as a means of education and not merely for the purpose of a professional qualification." Not least irrational is the thought that, since considerations of time make six years the most that can be demanded of a student both to get his degrees and do his apprenticeship, concurrent study and apprenticeship are thereby *compelled*, so that insistence on this propaedeutic necessarily compels a part-time, and consequently academically inferior and inadequate, substantive degree in the law course! That is just stupid. Furthermore this attempt to insist on a prior Arts degree is irrational since all law students, graduates or not, take the same courses; it is not that the graduate students are getting more advanced instruction, except in odd particulars. Again, *any* M.A. is allowed to count for this purpose, although manifestly, if the degree is really demanded as a proper preliminary to Law, some Arts courses are far better suited than others. All may be equally good training of the mind but not all are equally good propaedeutics, yet all are accepted as satisfying the requirement of the Ordinance. If the Arts degree is demanded not as propaedeutic but as evidence of sufficient prior general education, either all the other universities of Britain allow students to embark on the study of law on inadequate educational foundations, or the B.L. cannot be justified as a degree. It should be remembered that there would be nothing academically peculiar in demanding a higher educational standard for admission to the Faculty of Law than the minimum required to obtain entry to the university. Again the common observation that LL.B. students are generally of better quality than B.L. students is sometimes thought to support the present practice, but there is no evidence that LL.B. students are better *because* they have taken a prior M.A., rather than that they are better merely because it is, in general, only the better students who embark on the longer combined degree course. This observation is quite equivocal.

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[37] Goodhart, " The Vocational Teaching of Law " (1950) 1 J.S.P.T.L. (N.S.) 334; *cf.* Eisenmann's UNESCO Report, p. 83; Gower, *op. cit.*, 157; Gower, " Legal Training in the U.S.A." (1956) 3 J.S.P.T.L. (N.S.) 153.

The last reason alleged is the intellectual benefit of the study of allied disciplines, which provide the background to legal studies. Undoubtedly the study of the classical civilisations, British and European history, philosophy, economics and politics and so on do illumine legal studies.

But again this reason is invalidated by the fact that *any* M.A. is accepted, and also partly by the fact that it would take more than a dozen M.A. courses to give the student the barest introduction to half of the disciplines which impinge on legal study or enlighten some matter there met with. All knowledge is a seamless web and no Faculty can ever obtain the amount of prior and interlocking knowledge it might ideally desire. So too Gower [38] considers it Utopian to desiderate a higher standard of pre-legal education than the general standard accepted for admission into the university. Time and expense, not to speak of compulsory military training, dictate otherwise. "I can see no prospect of teaching a man all the law and practice that he needs in less than five years, and if this is so, it is impracticable to insist upon the potential lawyer remaining longer at school or taking an Arts or Science degree before commencing legal studies."

The proposal that no law student should be *required* to possess a prior Arts degree does not, of course, mean that such a student might not take one if he wished. It would certainly be permissible, though not obligatory, and it is to be hoped that some would actually do so, as it would almost undoubtedly be academically beneficial; moreover it could be provided that the possessor of such a degree would, in at least some circumstances, be entitled to exemption from a year of the Law course.

A Graduate Profession?

How, too, is the problem affected by the perceptible modern trend towards taking a degree as a normal means to obtaining a practising qualification, as is evidenced by a scrutiny of any modern lists of applicants for admission to the Law Society of Scotland, and the tendency, which many welcome and wish to further, towards making the solicitor's a graduate profession? As regards the first part of this question, so long as there is no Law Society of Scotland's School of Law this development is natural and desirable by itself; but, and in this respect the same applies to the second part too, if all intending solicitors have not only *de facto* but *de jure* to come to the universities for their law, that tends to restrict the activities of the universities. It would follow that they must provide instruction in all the vocational subjects, and must restrict their standard to that suitable for and within the capacity of the average intending solicitor. This may well be at variance with the proper development of university teaching.

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[38] *Op. cit.*, 157.

The danger is patent that to an increasing extent the Law Society would control the policy and curriculum of the Law Faculties, and this would be a most undesirable result.[39] Hence it seems to the present writer that it would be an excellent thing if the Law Society of Scotland were to set up their own establishments for the instruction of intending solicitors in professional subjects at least. It would free the universities from the necessity of catering for the, at present all too common, kind of student who merely wants a professional qualification. One could then insist that every student coming to the university should study law properly and with no special regard to practical requirements. At the present time the universities are to too great an extent doing the work of a Law Society's school and not that of a university at all.

A complete breach between universities and the practising profession is of course undesirable. The fact that a branch of human knowledge is of particular interest and direct practical use to a particular profession is not by itself reason for excluding it from a university, as witness the existence of Faculties of Medicine and Engineering. Equally if a profession wishes to raise its educational level by making graduation the requisite condition of entry it is hard for the universities to stop that. All that is essential is that the profession should not seek to dictate to the university the method and scope of its teaching. Unfortunately, that is exactly what has in fact happened in Scotland in the past through the presence of part-time staff and part-time students. Opposition to the proposal comes from the argument that " the rôles of the universities and the professional bodies are different and that the universities should not take part in professional training but teach law both to potential lawyers and others as a branch of knowledge like any other social science." [40] The universities may properly compromise with professional requirements to a modest degree, but the fulfilment of their academic function comes first. It must be remembered that there have been modern instances of a law school declining to bow any further to professional requirements and breaking away from vocational training entirely.[41] That is, however, an extreme step, and a reasonable *modus vivendi* is surely not beyond the possibility of formulation with benefit to both sides. The present *modus* has outlived its usefulness and is so riddled with anomalies, contradictions and absurdities that it can no longer be considered satisfactory.

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[39] In England Gower (*op. cit.*, 137, 146) has said of the recognition of the universities as approved law schools that it has resulted in " a tendency for the universities' curricula to follow closely those of the professional examinations and to be vocational rather than scientific and cultural with little opportunity for advanced research."

A New Approach

If then it is accepted that the system still followed in the Law Faculties in Scotland in 1956 is wholly unsound and radically bad in respect of (a) the unnecessary and irrational dualism of degrees; (b) too much part-time study and teaching; and (c) no provision for taking the degree with Honours, with what can it be replaced? Gower's plan of reform for England,[42] framed with full regard to professional requirements, called for a compulsory degree in law on the London University model (three years' full-time study) followed by a practical apprenticeship of *two* years in a solicitor's office for an intending solicitor, or of one year in a solicitor's office and one year in chambers for an intending barrister, during which time the student would receive further instruction in practical and strictly vocational subjects from the Law Society's School of Law. This plan has a great deal to commend it and in principle it seems equally suitable for Scottish conditions.

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[40] Gower, *op. cit.*, p. 160.

[41] See the discussion of the split in Ontario discussed in Wright, " Should the Profession Control Legal Education? " (1950) 3 Jo.Leg.Ed. 1.

[42] Gower, pp. 159–60. For comparison with other courses now being offered in Britain see Hollond, " Revision of Courses of Legal Study at Cambridge " (1947) 1 J.S.P.T.L. (N.S.) 105; Lawson, " Changes in the Law Courses at Oxford " (1947) *ibid.*, 112; Keeton, " Revision of Courses for the LL.B. in London " (1948) *ibid.*, 189; Grunfeld, " The University Law Courses " (1955) 3 J.S.P.T.L. (N.S.) 40.

Alternatively, on the basis that five years is as long as can be demanded of a young man as the minimum time required to obtain a degree and also complete the basic apprenticeship, that the period of apprenticeship will stay at three years, and that the professional bodies in Scotland will continue to expect the universities to give instruction in vocational as well as academic subjects, it seems reasonable to suggest at least two years' full-time study at the university, followed by either a third year's full-time study or two further years of study of vocational subjects concurrently with apprenticeship. The fifth year would be of full-time practical training. This scheme is less satisfactory ideally than the Gower scheme but possibly more feasible in Scottish conditions. Three years is really desirable for the full-time study of the more academic subjects but they could probably be adequately covered in two years. In the writer's view there is no possibility of completing an adequate training which includes a degree in law in less than five years. If such a shorter course must be offered it cannot include a degree course really worthy of the name.

Now, if effect is to be given to these conceptions, a new syllabus must be framed and effect be given to it by Ordinance. In framing this, due consideration must be given to the fundamental purpose and function of a university and in particular to the objects sought in the teaching of law at such an institution. Law must be regarded as a social science and taught in relation to the other social sciences, their interrelations, and the impact of one discipline on another. It is only if law is considered in its social setting and its rules are examined in relation to their purposes and the function they are fulfilling that the study can be adequate for modern society. "Law joins hands as never before with problems in economics, problems in political science, problems in the technique of administration. It is important that the curricula of our law schools should send out lawyers trained to appreciate the meaning of these relationships. They must shape the mind to a critical understanding of the foundations of jurisprudence."[43]

The curriculum must include certain of the main topics of legal science which are primarily of academic and cultural value though possibly of lesser direct or vocational use. These are important, because they are the background to the proper understanding of practical cases and problems and because they link up legal science with more general academic studies and they enable the student to see a specific point of law in a wider perspective. Under this head may be listed Roman Law, Jurisprudence, Public International Law, Comparative Law, and Scottish Legal History. At least two such courses should be compulsory. Secondly, there must be included a selection of the main branches of modern Scottish Law, both public (which is of increasing importance these days) and private. Thirdly, it is desirable to introduce the student to a few of the main kindred social sciences and other studies fundamental to his understanding of the place and function of law, all with a basic educational value and also having a background and relational value. This can best be done by permitting attendance on certain courses in the Faculty of Arts. The intelligent and educated law graduate must be equipped with some knowledge of these matters whether or not he intends to practise law. "Every lawyer, whether he devotes himself to private practice or the public service, has to make policy decisions, demanding a knowledge of economics, political science and sociology . . . and somehow an attempt should be made to teach him something about them. An equally strong case can be made out for a knowledge of psychology."[44] The same applies to history, philosophy and languages. Clearly not all of these can be taught to every student. Time and the capacity of the student mind decree otherwise, but it is surely reasonable to try to include two, or three if possible, of these subjects in a course. Lastly, there are subjects primarily practical and vocational which properly belong to the professional law school and the period after graduation but which have, possibly unfortunately, been accepted into the law faculties as graduating subjects. Their proper place is at the end of the course, or even as post-graduate subjects, concurrently with the apprenticeship. The difficulty is to avoid overloading the course but there are so many subjects deserving inclusion that it is clear that more than the traditional eight courses will be required in any revised scheme.

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[43] L. Ch. Sankey, quoted in (1933) J.S.P.T.L. 23; *cf.* Lord Atkin in (1932) J.S.P.T.L. 32.

During the years of full-time study it would not be essential, if students were full-time, to give any more, or even possibly as many, lectures as at present on each subject, as more reliance could be placed on textbooks and private reading, since the increased time for reading and the spreading of each subject over a full session would both be more beneficial than more lectures.

Now in the forefront of the legal training must be put an entirely new course, something which is offered in various patterns in English and American law schools but in Scotland has been only newly introduced, in Glasgow and Aberdeen. That is a course of Scottish Legal System. There is at present no preliminary course which provides an introduction to legal study, giving the student a bird's-eye view of the broad pattern of the historical development of the law,[45] the different branches of the law, the sources of the law, instruction on how to find and cite these materials, and how to use the apparatus of inquiry—what is called in America legal bibliography—the elements of statutory interpretation, the rules of precedent, legal terminology, and the broad outlines of procedure in civil and criminal cases. In short, the student should be shown at the very outset what legal study covers and what the apparatus of the science is.

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[44] Gower, *op. cit.*, 171. *Cf.* also ibid. 170, 176. At p. 173 he advocates joint seminars with other Faculties as a means of impressing on the student the interrelations of subjects.

[45] *Cf.* Gibb, *op. cit.*, at p. 158, "a short historical introduction."

Then there is the subject known as Scots Law.[46] Now it may have been the case in the eighteenth century that Scots (private) Law could, owing to its comparative simplicity, reliance on broad fundamental principles, and repeated restatement by institutional writers, be comprehended within the sweep of a single course. Today that is impossible owing to the enormous expansion and growing complexity of every branch of private law, and the greater number of statutes and cases of which account has to be taken, and so the course is grossly overcrowded and hopelessly condensed to the point of absurdity. There is enough material in the existing courses entitled Scots Law to fill six terms' study at least, rather than three.[47] Moreover, the subjects covered provide material for six or seven or eight separate courses in English universities, each studied over a full session. It is not necessary to follow the English practice to that extent, but it is essential that this vast course, covering most of the private law, be spread over at very least four and preferably six terms. There is also a strong case for taking Criminal Law out of this mass and making it a separate course.

There is not space here to deal at length with all the courses; only a few observations can be made. In Mercantile Law and Accountancy there should be distinct classes for law students and for C.A. apprentices, and it seems open to question, without prejudice to the status of fuller courses in the subject, whether the shorter course in Accountancy for law students should really be a graduating course.[49] Forensic Medicine might be widened to include the elements of Forensic Psychiatry and the principles of Penology. It must be remembered that law courses are taken by men who will some day be judges and sheriffs, and in view of the modern trend in the treatment of criminals, they should be introduced to the basic principles of these subjects in this course. Such a course must not precede the course in Criminal Law, which in turn leads to the observation that there must be, either prescribed by the Ordinance or by regulations made thereunder, a prescribed order of study, so as to ensure that students take their course in the order which is most appropriate. Evidence, Pleading and Procedure is again a practical class in part, and only the Evidence portion belongs properly to university study, Pleading and Procedure belonging to the professional law school and in default thereof to a late year of study, concurrently with practical experience.

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[46] *Cf.* Gibb, *op. cit.*, at p. 156. "The kernel of the present course is what is known as Scots Law. As a technical term this is an absurdity in this academic use . . . Either the expression should cease to be used and the course broken up into its principal components, or else a definite understanding should be had, once and for all, of what Scots Law covers."

[47] The Edinburgh Faculty in 1943 (Normand Committee Report, p. 18) favoured its extension to four or five terms. Aberdeen has extended the course to six terms, divided into a General course and a Professional course, the former of which is also a class in Arts.

It will no doubt be complained that all this is hopelessly idealistic and far too difficult. It is not. The past and present LL.B. is no more difficult than a law degree should be, and it cannot be diminished in scope without leaving out essentials, or in standard without falling below that requisite for a bachelor's degree. If it is too difficult for some who have in the past taken the B.L., that is unfortunate. But the minimum requirements of the B.L. degrees in the past have not properly justified a degree at all or any more than a diploma, and if some students cannot attain the standard proposed nothing can be done about it. They must just fail to obtain a degree. The idea that every student who gains entry to the universities should obtain a degree is unsound and pernicious, as much as the idea that everyone should go to the university. The maintenance of university standards will continue to make a degree beyond the capacity of some. Those who fall by the way must just fall. And therein lies the danger to the universities if the profession be made a graduate one. If that is done there may well be demands that individuals of a certain standard are worthy to be admitted to the profession and should therefore be allowed through their degree examinations. At present there is a gateway for such weaker vessels by the Law Society's examinations. Either the profession must accept the universities' standards, or not make the profession a graduate one, since the universities' standards can never be less than those of the profession.

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[49] It is not a graduating course in Aberdeen.

Degree with Honours

The criticism has already been put that no provision has been made in even the 1954 LL.B. Ordinance for the awarding of the degree with Honours. This is a serious defect and a most regrettable omission ; it keeps the Law Faculties in a position of relative inferiority to most other Faculties and to Faculties of Law elsewhere in the United Kingdom. It is, moreover, galling to the keen law student to find that a mere colourless Distinction is all that he can achieve ; that compares very poorly with his brothers in Arts and Science. Nor is it apparent what obstacles there are to the institution of a degree with Honours. As has been pointed out it is not at all necessary that there should be a long and distinct Honours course. If, however, it should be thought for some reason that a degree with Honours requires a different course with more extended study of some subjects the analogy of Science may be looked at whereby one or two subjects are chosen as principal subjects and studied for two or more, probably three, years at ascending levels, the number of other courses being slightly diminished. The understanding of Law, however, requires a reasonable spread of subjects to be taken, so that it would almost certainly be necessary to take rather more courses in all than for the Ordinary degree. An Honours course on the Arts model, with intensive study of a pair of subjects for three or four years, and only two or three other courses, would be absurdly narrow in Law, even if the degree were restricted to the purely academic legal subjects. But there can be no serious hardship in an Honours degree requiring longer than the Ordinary course as it would be purely an optional enterprise and a student seeking Honours might reasonably expect, as in other Faculties, to have to take longer than the minimum time to obtain his qualification.

Degree of LL.M.?

At present, and it is another of the numerous defects of the legal organisation of the Scottish universities, there is no provision for a higher degree in law obtainable by examination based on additional study and instruction. Independent research is a different matter; but surely some students have the interest and desire to pursue their studies rather further than the LL.B. stage, without necessarily having the desire or the time or the capacity to undertake independent research. Here again English experience suggests that there is a reasonable demand for such a degree, and of course it is consistent with academic practice to interpose a master's qualification between the baccalaureate and the doctorates. Such a degree has not been offered in the past in Scotland, possibly partly because of the length of the M.A., LL.B. courses. The time factor still applies to the extent that any such degree would almost necessarily be a part-time one. What is envisaged is the study of a small number of subjects, probably three, for at least two years after the LL.B. stage, some being LL.B. subjects at a more advanced level and others not included in the LL.B. at all, which all fall within the scope of a single broad topic, such as International and Comparative Law, or Public Law, or Constitutional and Legal History, or Legal Theory, or Private Law. An objection sometimes levelled against this degree is that a student who has taken Honours at the LL.B. stage has gone as far as he can usefully go by way of study and examination. As against that no student by taking an LL.B., even with high Honours, can claim to have covered every branch of legal science, nor could he have taken even Honours subjects to their uttermost limits. At the very least this question of a master's degree is a matter for examination.

A Professional School of Law?

There is no professional school of law in Scotland and so far no moves have been made to establish one. So long as the profession is not a graduate one there is clearly room for such an organisation, and even if the profession were to become a wholly graduate one there would still be room for it. It would be the function of the professional school in the first place to provide instruction in purely vocational subjects in supplement of those covered in the degree course, and to a large extent it would be an advantage to the universities if all the vocational subjects were handed over to be taught in the professional school. But even on the existing basis the professional law school could usefully give instruction, possibly to apprentices in their final year or in the year thereafter, in wholly practical subjects, and run refresher courses for men who have been qualified for some time. If such a school were to come into being it would ease the pressure on the universities and lessen the demands that they turn out finished lawyers. Again it is a matter which demands thought and must not be dismissed simply because we have never done things this way before in Scotland.

Research and the Doctorates

Like everything else in law, research has received disappointingly little attention in the Scottish universities. The excessive insistence on practice and vocational training has obscured another salient characteristic of a university, that it has the function, apart from transmitting knowledge, of extending and developing it, of refining and amplifying it, and this is an essential function. It is a function which receives adequate attention in other Faculties. In Law it is nearly forgotten, but there is enormous scope for it in Scotland and ample material in the shape of unexamined doctrines, historical lacunae, and scanty literature. Research in a modest way on a limited topic and under supervision has for some years been recognised, as in other Faculties, by the award of the Ph.D. and it is very desirable that this should continue. Nor need there be any change in the existing regulations for the award of the degree, which are, broadly and generally, at least three years' investigation of a chosen topic and the submission of a satisfactory typewritten thesis embodying the results of the investigation and the conclusions reached. The difficulty is to secure a sufficiency of the right kind of students who can be encouraged to do research. The essential is that the student should have the will and the interest to go exploring and to try to add something to the existing corpus of knowledge on his field of study.

The question of the LL.D. has been a matter of burning controversy in Scotland for years. In 1896 Galbraith Miller wrote[50]: "It is no exaggeration to say that the Faculty of Advocates has supplied the place of a great national university and the title of Advocate has been judicially recognised as equivalent to Doctor of Laws, and so conferring the title to teach in the universities, . . ." Whatever may have been the case when that was written, it is absurd to suggest today that passing advocate or obtaining any other qualification is equivalent to a doctorate of laws. It is not: there are no equivalents and the scholarly character of the Faculty or of individual advocates cannot be balanced against or supply the want of a recognised academic qualification.

In the eighteenth century the LL.D. was sometimes obtained by examination[51] but as the nineteenth century wore on it seems to have lapsed into a purely honorary degree, though in Aberdeen it is understood that down to the time of the 1858 Commissioners the regulations were similar to those for M.A. (then a second degree in Arts). The Commissioners under the Act of 1858 passed a general Ordinance regulating the conferring of the honorary degrees of D.D. and LL.D. in all the universities. The Glasgow

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[50] *Law of Nature and Nations*, pref. p. xi.

[51] Coutts, *op. cit.*, pp. 235, 323, 376.

General Council later memorialised the Commissioners to end the anomaly. Galbraith Miller[52] wrote bitterly: "The Ordinance of the Commissioners . . . cut off the Scottish Universities not only from their own previous history and practice but from the practice of other universities in Britain, or rather Christendom. They evidently assumed that no Law Faculty could ever hereafter have any use for the degree."

This state of affairs has met with almost universal condemnation in recent years, quite apart from the question how far there should be such a thing as honorary degrees at all.[53] The disgrace to Law has lain in that the LL.D. was conferred *only* as a reputed honour, and that it was not possible for a graduate in Law of a Scottish university to proceed to the highest degree in his own subject and Faculty by any amount of scholarship or distinction in his own field of study, unless some university should deign to give him the degree, and of this there could never be any guarantee. The position was logically wholly indefensible, and it is the most substantial step forward that the universities have taken in recent years to promote an Ordinance providing for the award of the LL.D. for scholarly and distinguished original contributions to the science and knowledge of law, obtainable on conditions similar to the D.Sc. and D.Litt. One result of this will consequently be to bring Law up to the same level as Letters and Science and give some advancement to the position of legal studies in the universities. The danger of confusion between the two kinds of LL.D.s is really small and other British universities find it possible to confer both kinds of LL.D., so that again this proposal will tend to conformity with general British academic practice. The most important point of course is that a graduate in Law will now, as much as his brother in Arts or Science, be able to attain the highest degree in his faculty on the strength of scholarship and contributions to legal knowledge.

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[52] (1898) 6 S.L.T. (News) 115.

[53] *Cf.* Galbraith Miller, *Law of Nature and Nations*, p. ix: "The honorary degree should be reserved for those who contribute to the science of law, or who do distinguished work in the legislative, judicial, executive or administrative department of government, imperial, local or municipal." It is perhaps a pity that there are any honorary degrees at all.

It is difficult to forecast what result the institution of this second and higher-level doctorate is likely to have. It is thought that there will be a small response and that it will tend to stimulate high-level research. The real basis for scholarship and the initial interest in legal studies must however be implanted at the start and that is why it is so important that the bachelor's degree be a satisfactory one. The present system gives the student neither the initial training nor the interest to proceed further; he is taught his professional bookwork, not introduced to a branch of scholarship with tantalising and fascinating queries on every side and endless problems deserving of examination.

Conclusions

This discussion may seem to have strayed far from its original subject, the consideration of the recently adopted Ordinances regulating the award of the basic degrees in Law. It has so strayed because the legal curriculum cannot be looked at by reference to the Ordinances alone, in isolation from the background, the candidates, the part-time system of study and the concurrent apprenticeship, and questions of professional training. Changes in one would react on the other and the universities are not such ivory towers as to be able to ignore the consequences of changes they make in their regulations. So, too, consideration of defects inexorably led on to consideration of what the universities should be attempting to do, and a suggested scheme of how they could do it to show how very bad and illogical these new Ordinances really are and how far they deviate from a reasonable and practicable scheme of study.

It is submitted in view of what has been written that the present system of university legal education in Scotland stands condemned and that the new Ordinances do not contain any such modifications as to give any grounds for the view that they will improve conditions; they are founded on erroneous premisses; they tacitly recognise and continue to permit the existence of professional requirements as the dominating factor in teaching; they do not treat Law as an academic discipline or a branch of scholarship; they make no provision for advanced scholarship. They are wholly bad, and the Scottish universities cannot properly perform their true function thereunder. The proposals made herein may be summarised as follows:—

1. All existing Ordinances regulating the degrees of LL.B. and B.L. should be rescinded.
2. The degree of B.L. should be abolished.
3. The requirement of an Arts degree prior to the LL.B. should be done away with.
4. A new degree of LL.B. should be devised on the lines indicated providing for (i) at least two years' full-time study of legal subjects; and (ii) degrees on both Ordinary and Honours standards.
5. Consideration should be given to the establishment of the higher degree of LL.M. for more advanced study under instruction and guidance.
6. Apprenticeship for the solicitor branch of the profession should be taken for the most part not with but *after* the university course.

This survey omits numerous topics which would have to be considered in a detailed examination of the subject, though some of them would fall within the discretion of the individual university and the particular teacher. However, until there is established a reasonable basis for teaching in the shape of satisfactory Ordinances for the basic degree these need not be considered further. This issue of a satisfactory basic degree is urgent, and the matter serious. The Law Faculties are not performing their academic function properly, and the 1954 Ordinances do not advance the matter one whit; they will not, cannot, do anything to raise the standard of legal scholarship in Scotland. The matter must be tackled afresh from first principles, and soon before it is too late.

DAVID M. WALKER.

CASES AND COMMENT

1. SCOTTISH CASES

DIVORCE—non-cohabitation order as bar to decree.

Murray v. *Murray*, 1957 S.L.T. 41, raised an interesting issue in the recognition of foreign decrees. A domiciled Scotsman sought to divorce his wife for desertion; the defender pleaded that the action was barred since she had obtained from the justices in an English magistrates' court an order to the effect that she was no longer bound to cohabit with the pursuer, which order had by statute (Summary Jurisdiction (Married Women) Act, 1895) the effect of a decree of judicial separation. The Lord Ordinary held that the order had no effect and, the facts being established, granted decree of divorce. The English magistrates' court had jurisdiction to make the order it did, but that could not, it was held, preclude the court of the domicile from investigating the facts with a view to divorce. The statute in question did not apply to Scotland and the issue in the English proceedings was different from that in the divorce case. Accordingly the obtaining of the non-cohabitation order did not constitute reasonable ground for non-adherence. While the primacy of the court of the domicile must be admitted it must be confusing for an individual to obtain such an order from a court which had jurisdiction to make it and then to be told that it was of no avail in Scotland, but the jurisdiction of the court of the domicile cannot really be allowed to be ousted by lesser matrimonial proceedings elsewhere.

D. M. W.

DOCUMENTS—Crown privilege.

The appropriately named *Whitehall* v. *Whitehall*, 1957 S.L.T. 96, raised a most interesting issue of Crown privilege, a daring attempt to extend that already too-wide doctrine. In cross-actions of divorce and adherence and aliment between a soldier and his wife, the latter produced in evidence a number of letters from the S.S.A.F.A. dealing with the attitude of the parties. The Lord Advocate lodged a minute stating that he believed the documents *might be of a class* which in the opinion of the Secretary for War should not in the public interest be produced and asking leave to have the letters sent to London to see whether the War Department wished to object to their production or not. The court refused the motions, doubting their competency, since the Lord Advocate was not in any capacity a party to the case, and holding that in any event a case of public interest had not been made out and that the doctrine of Crown privilege did not cover documents neither in the possession of nor emanating from a Crown servant. It is well that this startling claim was rejected: had it been conceded the Crown would have been entitled to intervene in any cause and object to the production of evidence on the ground of "public interest" which varies with the length of the Minister's foot, and, as the Lord President observed, the courts would have gone a long way towards subjection to executive policy. This is probably the most extreme attempt yet to extend the doctrine of Crown privilege, without, so far as can be seen, any justification whatever, and the court very rightly and firmly rejected the attempt. That there may be cases of genuine public interest is undoubted but it is hard to see any element of public interest in the facts of this case.

D. M. W.

SOLATIUM—title to sue.

Laidlaw v. *N. C. B.*, 1957 S.L.T. 125, must be regretted as an unjust, unsatisfactory, and, it is submitted, legally unsound decision. A mother sued for damages for the death of her son; her husband had not lived with her for years and had never supported her or the child, but he wrote to the defenders declining to concur in the claim of damages and waiving any claim competent to him. It was held that the mother had no title to sue so long as her husband lived, and that even his renunciation did not give her a title. On the precedents the decision is justifiable; in common sense and justice it is wicked, and it is submitted that the relevant precedents were distinguishable and were in any event wrongly decided. The *actio injuriarum* as defined in *Eisten* v. *N. B. Ry.* (1870) 8 M. 980 was competent to parents, but at that time the right of action would be *exercised* by the husband alone; but it was not *vested* in him alone and, being properly a joint right, was exercisable by both spouses or the survivor after the Married

Women's Property legislation had made it competent for women to sue. The Lord Ordinary in *Whitehead* v. *Blaik*, 20 R. 1045 saw this, but the Division failed to follow him and since then the fallacy that only the husband may sue has been accepted and, unfortunately, affirmed in this case. The result is probably beyond cure by anything short of legislation now. The case is regrettable for the failure by the First Division to analyse the basis of the claim for *solatium* sufficiently closely or sufficiently far back in history, and in the result the deceased's mother has been most unjustly denied a remedy.

D. M. W.

RENT RESTRICTION —title of deserted wife to possess.

Temple v. *Mitchell*, 1957 S.L.T. 169, is a case where Scots and English law have diverged. A tenant protected under the Rent Acts disappeared leaving his wife in occupation. The landlords sought to remove her and succeeded in their action. English decisions since at least *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 have allowed a deserted wife an equitable interest in the matrimonial home sufficient to resist a claim to possession by the landlord, and it was naturally urged that these cases should be followed. It was pointed out that the exceptional position of the deserted wife in England sprang from her status as wife rather than from anything in the Rent Acts. The case was moreover quite distinct from cases of husbands absent on duty or business but retaining *animus revertendi*. The differences were put most clearly by Lord Patrick who showed that the basic difference was that in England a deserted wife has a right under the Married Women's Property Act, 1882 (not applicable to Scotland) to stay in the matrimonial home, even against her husband or the landlord, until an order is made against her, whereas in Scotland the husband can eject her from the house he tenants, and so, of course, can a landlord. Lord Mackintosh's dissent was based on the overriding policy and intention of the Rent Acts to maintain a roof over a tenant's head and that the wife's possession was the tenant's possession so long as he took no steps to revoke his permission to her to continue in occupation. He based his view not so much on the doctrines of *Bendall* v. *McWhirter* as on earlier cases. The difficulty about this view seems to be that since the tenant had no *animus revertendi* it is hard to see how the wife maintained *his* possession, and it is straining the principles of implication to say that the wife had his tacit permission to stay and maintain his tenancy. The decision was a difficult one and the court clearly had sympathy for the wife but when one has regard to the way in which the doctrine has been developed in England it does appear plainly to depend on specialties of English law, so that the present decision is quite consistent with Scots law. The resultant discrepancy between the two legal systems is simply unfortunate.

D. M. W.

NATURAL JUSTICE—

Barrs v. *British Wool Marketing Board*, 1957 S.L.T. 153, is a useful reminder and reaffirmation of the principle of natural justice that justice must be seen to be done and that a decision is objectionable if given in circumstances where one side could put forward arguments without the other side having an equal opportunity to do so. A tribunal dealing with an appeal by a producer of wool against the price fixed by two appraisers retired for consideration with the two appraisers but excluding the producer's representative. The court held that the tribunal was a body which had to act judicially and had transgressed the principles of natural justice in its conduct of the appeal, the question not being one of the merits of the appeal but whether there had been an opportunity for injustice. This application of the principle may be new but it is a familiar one and it is rather disappointing that tribunals should have to be reminded of it again: it is not enough to do justice; it must also be seen to be done in a manner above suspicion.

D. M. W.

2. ENGLISH CASES

NEGLIGENCE —Skylarking employee—Injury caused to fellow workman.

In *Hudson* v. *Ridge Manufacturing Co., Ltd.* [1957] 2 W.L.R. 948 the facts were as follows: For nearly four years one of an employer's servants had practised foolish pranks on his fellow workmen by indulging in horseplay such as tripping them up. One day in the course of such skylarking this workman seized a fellow workman from behind, forced him on to the ground, and when the latter put out his hand to save himself he fractured his wrist. The injured man then sued his employers, not on the ground of vicarious responsibility, but because he alleged they were personally guilty of a breach of their common law duty to take care for the safety of their employees. He contended, in particular, that they had failed to maintain discipline and to take proper steps to put an end to this skylarking which might lead to injury at some time in the future. Streatfeild J. held that as their servant's potentially dangerous behaviour had been known to the employers for a long time, and as they had failed to prevent it or remove the source of danger, they were liable to the plaintiff for failing to take proper care for his safety. His Lordship said: "Here is a case where there existed, as it were in the system of work, a source of danger, through the conduct of one of the defendants' employees, of which they knew, repeated conduct which went on over a long space of time, and which they did nothing whatever to remove, except to reprimand and go on reprimanding to no effect. In my judgment, therefore, the injury was sustained as a result of the defendant's failure to take proper steps to put an end to that conduct, to see that it would not happen again, and, if it did happen again, to remove the source of danger."

This case seems to raise important questions of principle. The duty is certainly not an absolute one and one wonders if in such cases it can really be reasonable always to expect an employer to remove a source of danger when that source is not a defective piece of plant or machinery but a live member of a trade union. The other question raised is whether the employee's skylarking can be regarded as part of the employers' system of work. It is not entirely clear from Streatfeild J.'s opinion whether he considered it was, and that the employers' system was thereby rendered unsafe, or whether he merely based his decision on the general principles of the law of negligence. With respect, it is thought that the latter is the correct approach. The employee's skylarking could hardly be part of his employers' system of work if it was not done in the course of his employment. The pursuer did not attempt to contend that the employers were vicariously responsible for their workman's horseplay, presumably because it was not within the scope of his employment. It would be curious if they could nevertheless be liable for failing to provide a safe system of working. It was authoritatively decided in *Ramsay* v. *Wimpey*, 1951 S.C. 692; 1952 S.L.T. 46, that system of work could not be extended to include what occurred outwith working hours. Here what occurred was within working hours but was probably not within the scope of employment. Unless it was (which is arguable but was not contended), it seems impossible to say that the employers failed in their duty to provide a safe system of working.

W. A. E.

NEGLIGENCE —Injurious dust —Standard of care.

Dermatitis and pneumoconiosis cases feature frequently in the courts these days. The plaintiffs' case is usually based both on breach of statutory duty to prevent dust (sections 4 and 47 of the Factories Act, 1937, are the two sections most usually relied upon) and on breach of duty at common law. In a specialised trade where dermatitis cases are uncommon and the danger is not yet fully appreciated, liability at common law is difficult to prove and it is usually only for breach of statute that defenders are found liable. But as the numbers of cases of dermatitis in that particular trade increase, the common law tends to move more into line with the statutory duties, and employers are held liable for ordinary negligence in not taking reasonable precautions to protect their workmen from dangers about which they knew or ought to have known.

This process of transition is illustrated by the second case to come before the English courts involving the contraction of industrial dermatitis from the dust of West African hardwoods. This was *Graham* v. *Co-operative Wholesale Society, Ltd.* [1957] 1 W.L.R. 511—the first case being *Ebbs* v. *James Whitson & Co., Ltd.* [1952] 2 Q.B. 877. The plaintiff Graham in 1954 contracted industrial dermatitis as a result of the settlement on his skin of dust from West African hardwoods passing through a sanding machine. It was proved that it was only about 1952, or the end of 1951, that suspicion of West African hardwoods was beginning to be aroused, but knowledge of this was not widespread throughout the trade. The employers' works manager did not know about the danger. The question, therefore, was whether he ought to have known by keeping abreast of new developments and discoveries which might reveal hitherto unsuspected sources of danger to his workmen. The trial judge stated that he was not entitled to wait until the matter was forcibly brought to his notice either by an outbreak of disease in his factory or something of that sort, but must take reasonable steps to keep his knowledge up to date. But on the evidence there was nothing in any trade bulletins or circulars issued to indicate the dangers concerned, nor was it the practice of other employers to guard against dermatitis from wood dust. Accordingly the common law case against the defenders failed as did, for reasons of construction, his case based on breach of sections 4 (1) and 47 (1) of the Factories Act, 1937.

The judge added that this was the second reported case of industrial dermatitis that had arisen from West African hardwoods, and, although the incidence of sensitivity to it might be small, there was nevertheless a proportion of people working in the woodworking industry likely to be injured. He said the defendants were a very well-known body and he had no doubt that they would take steps to see that the facts of the case were brought to the notice of the Furniture Trade Development Council so that that council could circulate the industry on the matter as it thought right; and he also suggested that the Ministry of Labour and National Service be informed.

When in due course circulars are sent out to employers specifying in more detail the likely dangers from working with West African hardwoods, liability for failing to take reasonable precautions at common law may be more easy to establish.

W. A. E.

NEGLIGENCE —Unsafe plant —Tool supplied by reputable supplier.

In *Davie* v. *New Merton Board Mills, Ltd.* [1957] 2 W.L.R. 747 the plaintiff, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for the plaintiff's use by his employers, although apparently in good condition, was of excessive hardness, having been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers, who, in turn, had sold it to the employers. The defect was not latent in respect that the manufacturers could have discovered it by reasonable inspection. The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool, and against the makers on the ground that they were under a duty to those who they contemplated might use it. The makers contended that as the plaintiff had not used the drift with the socket for which it was designed, it had not been used in the manner for which it had been supplied and, therefore, they were not liable. But it was held, according to the principle laid down in *Donoghue* v. *Stevenson* [1932] A.C. 562; 1932 S.C.(H.L.) 31; 1932 S.L.T. 317, that use of a tool for a different, albeit similar, purpose from that for which it was intended did not *ipso facto* absolve the manufacturer from liability; and that the use of the drift by the plaintiff was not so foreign to the intended use as to do so.

For the employers it was contended that there was no logical distinction between their liability towards their employees injured on a third party's premises and their position in regard to equipment reasonably and perhaps necessarily obtained by them from an independent contractor. It was held, however, following *inter alia Donnelly* v. *Glasgow Corporation*, 1953 S.C. 107; 1953 S.L.T. 161, that the employers could not escape liability for breach of their personal obligation as employers merely by proving that they had taken care to buy an apparently sound tool from a reputable supplier. They were, therefore, liable to the plaintiff for the injury caused by the dangerous tool.

W. A. E.

CONFLICT OF LAWS—Recognition of foreign decree of divorce—Jurisdiction based on residence.

The unsatisfactory position regarding the recognition of foreign decrees of divorce is exemplified in *Arnold* v. *Arnold* [1957] 2 W.L.R. 366, which is important for its refusal to follow *Warden* v. *Warden*, 1951 S.C. 508; 1951 S.L.T. 406. It was *inter alia* held in *Arnold* that it would be contrary to principle and inconsistent with international comity if the courts of this country refused to recognise the jurisdiction of the Finnish courts to dissolve a marriage founding jurisdiction on the parties having last lived together in Finland. This is a clear departure from the rule followed in the Scottish courts that the only test of jurisdiction in regard to the recognition of foreign decrees is whether the husband was domiciled within the jurisdiction of the court—and this despite the recent introduction into Britain of the residence of the pursuer as a ground of jurisdiction. The position therefore is far from satisfactory as different rules are applied in Scotland and in England. Moreover in *Arnold* Mr. Commissioner Latey, Q.C., went out of his way to state that it was not in every case in which a wife went into residence abroad only for a short time, whether for ninety days (as required in some American states) or even a year, with the mere intention of obtaining a divorce, that the English courts would recognise such a decree of divorce.

With respect, it seems to add to the confusion if the English courts are to reserve the right to scrutinise the foreign residence requirements to decide if they are reasonable, because no divorced spouse will ever know, before the matter is judicially tested, whether in England he or she can really be regarded as divorced at all. If this is the law of England, there is something to be said for the inflexible and certain Scottish rule that domicile alone is the test of jurisdiction in respect of a foreign decree—though it is quite inequitable considering that residence is now a ground of jurisdiction in Scotland.

The need for an international convention seems paramount, whereby residence qualifications are standardised to a reasonable period to avoid too facile an acquisition of jurisdiction through a brief residence merely undergone with a view to obtaining a divorce.

W. A. E.

DRIVING UNDER THE INFLUENCE OF DRUGS—Section 15 (2) Road Traffic Act, 1930.

In *Armstrong* v. *Clark* [1957] 2 W.L.R. 400 the defendant was charged under section 15 (2) of the Road Traffic Act, 1930, for driving a motor-vehicle while "under the influence of drink or a drug," so as to be incapable of proper control of the vehicle. In fact he was a diabetic, no alcohol was involved, and his semi-comatose state had been induced by taking an overdose of insulin. In these circumstances the justices dismissed the case, but the Divisional Court allowed an appeal against their decision on the ground that insulin was a drug within the meaning of the Act and this had rendered the defendant incapable of driving. As Goddard C.J. said: "the justices and everyone must remember that this section was designed for the protection of the public, and if people happen to be in a condition of health that renders them subject to comas or take remedies which may send them into a coma, they must not drive because they are a danger to the rest of Her Majesty's subjects."

W. A. E.

3. PRIVY COUNCIL CASES

STATE ACT: Long service leave: No inconsistency with Commonwealth award.

Charles Marshall Proprietary, Ltd. v. *Gerald Alexander Collins* ([1957] 2 W.L.R. 600) was an appeal by special leave from a judgment of the High Court of Australia, the issue being whether an Act of the State of Victoria, the Factories and Shops (Long Service Leave) Act, 1953 (called the State Act), was inconsistent with a law of the Commonwealth and therefore invalid to the extent of the inconsistency under section 109 of the Constitution. The provisions of the Commonwealth law which were alleged to create the inconsistency were contained in the Metal Trades Award, 1952, made by a conciliation commissioner under the Commonwealth Conciliation and Arbitration Act, 1904–1952. Both parties accepted the position, as found by the High Court, that the terms of the above Act brought the provisions of the award into force as part of the law of the Commonwealth for the purposes of section 109. Section 7 (1) of the State Act provided: " Subject to this Act every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer." By section 7 (2): " The amount of such entitlement shall be—(*a*) on the completion by a worker of 20 years' continuous employment with his employer—thirteen weeks' long service leave and thereafter an additional 3¼ weeks' long service leave on the completion of each additional 5 years of continuous employment with such employer." The subsection contained other provisions with regard to different periods of service, including: " (*c*) In the case of a worker who has completed at least 10 but less than 20 years of continuous employment with his employer and whose employment is terminated—(i) by the employer for any cause other than serious and wilful misconduct; or (ii) by the worker on account of illness incapacity or domestic or any other pressing necessity where such illness incapacity or necessity is of such a nature as to justify such termination—such amount of long service leave as equals one-eightieth of the period of his continuous employment." By section 17 (1) (*d*) any person who failed to comply in any respect with any provision of the Act was guilty of an offence.

The respondent, a factory inspector, prosecuted the appellant for not granting a dismissed employee pay for a period of long service leave to which he was admittedly entitled under section 7 (2) (*c*) of the State Act, if applicable. The Metal Trades Award, 1952, admittedly applied to the appellant and the employee, and it was submitted that it was inconsistent with section 7 (2) (*c*) and therefore rendered that section inapplicable to the appellant. The Metropolitan Industrial Court at Melbourne dismissed the information on the ground of the inconsistency alleged. The respondent appealed to the High Court and the first point which the present appellant took was that the appeal to the High Court was not competent by reason of the provisions of section 31 of the Conciliation and Arbitration Act, 1904–1952. That point failed and the decision on it was not now challenged. On the point under section 109 the appeal succeeded, the majority of the High Court holding that there was no inconsistency. They set aside the order of the Metropolitan Industrial Court and remitted the information to that court for rehearing.

The Board stated that the appellant submitted in the first place that the award on its true construction regulated all the terms and conditions of employment; that it occupied the whole field; that long service leave was a term or condition of employment; and that therefore the State Act, so far as applicable to metal trade workers, was inconsistent with the award, although the award made no reference to long service leave and did not purport to deal with it. If that were right, the appeal succeeded. Alternatively, the appellant submitted that there was an actual conflict between the relevant provisions of the State Act and provisions of the award. The award in the present case was a composite document which concerned basic wages, margin wages, apprenticeship, travelling and camping allowances, hours of work, overtime, holidays and Sunday work, contract of employment, annual and sick leave and other miscellaneous matters. There was no reference to long service leave, and the question of such leave had not been raised. If it had, the Commissioner would have had to refer it to the court. The Board agreed with the High Court that long service leave was an entirely distinct subject-matter from the matters determined and regulated by the award. In other words, long service leave differed in kind from public holidays and from annual leave. It was a separate item in industrial relations. That would seem obvious in principle, but was placed beyond argument in the present context by the provisions of sections 13 and 25 of the Conciliation and Arbitration Act which specified it as a separate item. There were no grounds in principle or authority for construing the award as covering the " field " of long service.

With regard to the alleged particular inconsistencies, it was said that there was actual conflict between certain specific provisions of the award and the relevant provisions of the State Act. By clause 19 (*b*) of the award employment could be terminated by a week's notice or by the payment or forfeiture of a week's wages. It was said that that was inconsistent with section 9 (2) of the State Act in that men who had served for 10 years or more, if dismissed, received more than one week's pay. But the argument failed *in limine* once it was realised that the two documents were concerned with separate and distinct matters. The award was appropriate to the general position of wage earners. If it had dealt in later clauses with long service leave, it might well have been expected that the " general " clause would have been expressly subject to the provisions of the later special clause. The absence of such words created no inconsistency when the matters were dealt with, as here, in separate and independent documents. On the basis of this conclusion on the first submission the whole award must be read as subject to the provisions of a State Act, if any, concerned with long service leave. Clause 19 (*c*) (i) of the award stated: " An employee (other than an employee who has given or received notice in accordance with sub-clause (*b*) of this clause) not attending for duty shall, except as provided by clause 20 of this award, lose his pay for the actual time of such non-attendance." It was contended that that meant " no work, no pay," whereas the State Act provided for 13 or more weeks of pay for no work. The answer as stated above could be reinforced in this case by the fact that the clause made no reference for annual leave which, under clause 21 of the award, meant two weeks of pay with no work. The word " duty " might well have been inserted to make it clear that the clause was not to operate when the employee was not due to attend either under his contract or the award, or under any valid State Act. There was accordingly no inconsistency between the State Act and the award within section 109 of the Commonwealth Constitution, which provided that in the case of inconsistency between a State and a Commonwealth law the former was to the extent of the inconsistency to be invalid. The appeal was therefore dismissed.

Union of arbitral and judicial functions.

Attorney-General for Australia v. *The Queen* ([1957] 2 W.L.R. 607) was a consolidated appeal, by special leave, by the Attorney-General for Australia and by three judges of the Commonwealth Court of Conciliation and Arbitration from a judgment and order of the High Court of Australia which, by a majority of four judges to three, made absolute an order *nisi* for a writ of prohibition against the three judges of the Court of Conciliation and Arbitration, and the Metal Trade Employers' Association. The order for prohibition which the High Court made prohibited further proceedings under two orders of a judicial character which the Arbitration Court made on May 31 and June 28, 1955. The first order required obedience by the respondent, the Boilermakers' Society of Australia, to a provision in an industrial award, called " The Metal Trades Award," by ceasing to be a party to or concerned in a ban on work. The second order fined the society £500 for failure to comply with the first order.

The questions on the present appeal—stated to be questions of great and general importance—were whether it was constitutional for the Commonwealth Parliament to grant both judicial and non-judicial powers to judges appointed for life, and, if not, whether in the case of such a grant to judges of the Commonwealth Court of Conciliation and Arbitration it was the grant of judicial or non-judicial powers which failed. The High Court, by a majority, decided that it was unconstitutional to combine judicial and non-judicial power, and that in this case it was the grant of judicial power which was invalid. The respondents were not represented but the respondent, the Boilermakers' Society of Australia (referred to as " the union "), lodged a case.

The Board stated that the union was an organisation of employees registered in accordance with the provisions of the Conciliation and Arbitration Act, 1904–1952, a Federal Act (referred to as "the Act"). The Metal Trades Employers' Association was an organisation of employers similarly registered. On January 16, 1952, an award was made under the Act binding both the union and the association, of which a clause provided: "No organisation party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award." The association alleged that the union had not complied with this clause of the award and applied to the Commonwealth Court of Conciliation and Arbitration (established under the Act and referred to as "the court") for a rule that the union should show cause why an order should not be made under section 29 (1) (*b*) of the Act ordering compliance with the above clause of the award, and an order under section 29 (1) (*c*) of the Act enjoining them from committing or continuing a breach of the clause. The court made an order accordingly on May 16, 1955, and subject to certain immaterial amendments a rule absolute was made on May 31, 1955, the union being ordered to comply with the award as therein stated and being enjoined from further breach of it. The association alleged that the union had disobeyed the order of May 16, 1955, and issued a summons directed to the union to answer a charge of contempt of the court in respect of such disobedience, and the court, on hearing the summons, made orders on June 28, 1955, fining the union £500 and ordering them to pay the costs of the association.

At that stage the controversy began which reached the Board; for on July 30, 1955, the union applied to the High Court of Australia and obtained from one of the judges an order *nisi* directed to the judges of the court which made the orders of May 31 and June 28, 1955, and to the association to show cause why a writ of prohibition should not issue prohibiting them from further proceeding with or upon the said orders. The ground of the application and the order were as follows: "That the provisions of section 29 (1) (*b*) and 29 (1) (*c*) and 29A of the [Act] are *ultra vires* and invalid in that:—(A) the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character, and (B) the powers which sections 29 (1) (*b*), 29 (1) (*c*) and 29A respectively of the [Act] purport to vest in the said court and exercised by it in making the said orders are judicial, and (C) the said sections 29 (1) (*b*), 29 (1) (*c*) and 29A are accordingly contrary and repugnant to the provisions and Constitution of the Commonwealth and, in particular, Chapter III thereof." On March 2, 1956, the High Court, by a majority, made the order *nisi* absolute.

On reading the title of the Act and its chief objects, the Board stated it could not be denied that its primary purpose and, in effect, its only purpose was the settlement of industrial disputes by conciliation and arbitration. But it was necessary to see what part was to be played by the court established under the Act in a field apparently so remote from the proper exercise of the judicial function. Part II of the Act provided for the appointment of conciliation commissioners and prescribed their duties and functions. It was competent for, and in certain events compulsory on, the conciliation commissioner to refer disputes in which he had original cognisance to the chief judge of the court, who might in turn refer them to the court for hearing and settlement. Part III, which established the Commonwealth Court of Conciliation and Arbitration, enacted that there should be a chief judge and such other judges as were appointed in pursuance of the Act, and that it should be a superior court of record. It complied with the provisions of section 72 of the Constitution with regard to justices of the High Court and of the other courts created by Parliament. It then prescribed the jurisdiction of a single judge, other jurisdiction being exercised by not less than three judges. Section 25 referred to an important original jurisdiction conferred on the court. It was beyond dispute that the court was vested with powers, functions and authorities of an administrative, arbitral and executive character as alleged in the application for a writ of prohibition.

Had judicial power also been vested in the court? It was clear that that was a purpose of the Act, otherwise it would not have been called a court or a superior court of record, or have made the provision which it had for the appointment of judges. No sections other than 29 and 29A of the Act needed to be mentioned. It had become clear that just as administrative, arbitral and executive powers, functions and authorities had been vested in the court, so also by those sections had judicial power been vested in it, even to the extent of fining a citizen or depriving him of his liberty.

Was it permissible under the Constitution of the Commonwealth of Australia for the Parliament to enact that on one body of persons, call it tribunal or court, arbitral functions and judicial functions should be together conferred? The Constitution was based on a separation of the functions of government. By section 71, the first section of Chapter III, headed "The Judicature," it was provided that the judicial power of the Commonwealth was to be vested in a Federal Supreme Court and in such other courts as the Parliament invested with federal jurisdiction. It was to Chapter III alone that the Parliament must have recourse if it wished to legislate with regard to the judicial power. That chapter was in its terms detailed and exhaustive, and their Lordships dissented from the contention, sometimes explicitly, sometimes implicitly, advanced that, inasmuch as there was no express prohibition of other legislation in that field, it was open to Parliament to turn from Chapter III to some other source of power.

Yet that general proposition was subject to a qualification, a qualification which powerfully supported the proposition. For in section 51 the final matters in respect of which the Parliament was empowered to make laws were found in placitum (xxxix): "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof or in the Government of the Commonwealth or in the Federal Judicature or in any Department or office of the Commonwealth." That placitum looked forward to the vesting of power in the Federal Judicature which was found in Chapter III. It assumed such vesting and empowered the Parliament to make laws in respect of matters incidental to the execution of such power. The conferment of such a limited power of legislation in section 51 made it clear that it was in Chapter III alone that a larger power was contained. There could not well be a clearer case for the application of the maxim: *Expressio unius exclusio alterius*. The question, in whatever form it was stated, was whether and how far judicial and non-judicial power could be united in the same body. The Board stated that there was nothing in Chapter III, to which alone recourse could be had, which justified such a union. Accordingly it was not permissible under the Constitution of the Commonwealth for the Dominion Parliament to enact that arbitral functions and judicial functions should be conferred on one body. Therefore the Commonwealth Conciliation and Arbitration Act, 1904–1952, which vested the Court of Conciliation and Arbitration established under that Act with powers of an administrative, arbitral and executive character, was, so far as the provisions of section 29 (1) (*b*) and (*c*) and section 29A were concerned, which purported to vest judicial power in that court, *ultra vires* and invalid.

In the formal case put in it was submitted that the appeal was not competent in that it raised an *inter se* question and that the High Court had not given a certificate under section 74 of the Constitution that the question was one which ought to be determined by Her Majesty in Council. The issue was whether the validity or invalidity of these sections of the State Act which purported to give the court judicial power was a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the states respectively. It appeared to the Board that that issue did not raise an *inter se* question. It was only where the delimitation of the Commonwealth power necessarily implied a decision as to the extent of the power of a subordinate state that such a question truly arose. For in such a case the advance of the Commonwealth power must *pro tanto* reduce the state power. If that test were applied here, a decision for or against the validity of the impugned sections neither advanced the Commonwealth power nor reduced the state power. It was implicit in an *inter se* question that between the powers of Commonwealth and state there should be a mutual relation and a reciprocal effect. Neither of these features were present in a question the answer to which, whatever it might be, would not alter the boundaries of the respective powers, and accordingly section 74 of the Constitution had no application to the question before the Board. The appeal was therefore dismissed.

CRIMINAL LAW: View with witnesses in absence of judge.

Tameshwar and Seokumar v. *The Queen*, in which, on June 18 last ([1957] 3 W.L.R. 157), the Board gave their reasons for allowing the appellants' appeals against conviction, came before the Board by special leave *in forma pauperis* from a judgment of the Court of Criminal Appeal of British Guiana, which had dismissed their appeals against conviction before a judge and jury on a charge of robbing, on February 25, 1954, when armed with a cutlass and a gun, one Sherry Browne, of a bag containing $13,129.68. Each had been sentenced to 10 years' penal servitude and six strokes by flogging. Both had pleaded Not Guilty and had relied on alibis. The flogging had not been carried out. The jury viewed the *locus in quo* in the presence of witnesses for the prosecution; those witnesses gave evidence there, but in the absence of the trial judge. The main contention of the appellants on the present appeal was that the view was part of the trial and that to deprive a prisoner of the right to have the judge in possession of all the testimony so that he might charge the jury in the light of all the evidence was to deprive him of a proper trial and was a wholly improper procedure which vitiated the trial.

The Board stated that there was no suggestion of impropriety on the part of the jury or witnesses or anyone else at the view, or any irregularity apart from the absence of the judge. No complaint was made at the trial of his absence, for the reason that for many years in British Guiana it had not been regarded as necessary for the judge to attend a view. In England it was a rare thing for a jury in a criminal trial to view the place where the crime was said to have taken place; where they did, it seemed that the judge need not be present if there were no witnesses. But it was very different when a witness demonstrated to a jury at the scene of the crime. By giving a demonstration he gave evidence just as much as when in the witness-box he described the place in words or referred to it on a plan. Such a demonstration on the spot was more effective than words could ever be, because it was more readily understood. It was more vivid, as the witness pointed to the very place where he stood. It was more dramatic, as he re-enacted the scene.

As a view of the kind here in question was part of the evidence, it must be held in the presence of the judge. The judge and jury must be present throughout the giving of the evidence and every part of it, so as to be able to appreciate it and assess its worth. The summing-up of the evidence was an essential part of every criminal trial, but it could only be properly done by a judge who had heard all the evidence and seen all the demonstrations given by witnesses.

Counsel for the Crown relied on section 45 (i) and (ii) of the Criminal Law (Procedure) Ordinance, 1953, re-enacting a provision to the like effect dating back to 1893, as justifying the practice in British Guiana, where, in many cases, the judge had not accompanied the jury. In *Hassan Mahamed* v. *The Queen* the Court of Criminal Appeal in British Guiana decided in 1954 that the absence of a judge on a visit to the place was not an irregularity. The section referred to stated: " Where in any case it is made to appear to the court or a judge that it will be for the interests of justice that the jury who are to try or are trying the issue in the cause should have a view of any place person or thing connected with the cause, the court or judge may direct that view to be had in the manner and upon the terms and conditions to the court or judge seeming proper. When a view is directed to be had the court or judge shall give any directions seeming requisite for the purpose of preventing undue communication with the jurors: Provided that no breach of any of these directions shall affect the validity of the proceedings unless the court otherwise orders." The section primarily contemplated a simple view where no witnesses were present, but it undoubtedly extended—and the Board so held in *Karamat* v. *The Queen* ([1956] A.C. 256)—to cover a view where witnesses were present and demonstrated where they stood. Counsel for the Crown argued that the section applied alike to a view without witnesses as to a view with witnesses, and that if a judge need not be present at the one, he need not be present at the other. The Board did not accept that contention. The power which section 45 gave to determine the terms and conditions on which a view might be held must be exercised in accordance with the fundamental principles of a fair trial. One of those principles was that every piece of evidence which a witness gave must be given in the presence of the tribunal which tried the case; and the tribunal was not the jury alone, but the judge and jury. By section 90 of the Ordinance a trial was to be had before a judge of the court and a jury. If witnesses gave demonstrations or answered questions at a view, that was undoubtedly part of a trial and must be had before the judge and jury. Those observations did not apply to a simple view without witnesses.

Had the judge attended the view and seen the demonstration by the witnesses in the present case, he might have noticed things which everyone else had overlooked, and his summing-up might have been thereby affected. His absence during part of the trial was such a departure from the essential principles of natural justice that the trial could not be allowed to stand. It was argued that the convictions should not be set aside unless the absence of the judge was shown to have affected the result of the trial, but the Board did not think that they should stand in any case. It was too disturbing a precedent to be allowed to pass.

4. THE SECOND AND THIRD REPORTS OF THE LAW REFORM COMMITTEE FOR SCOTLAND

The Second Report (Cmnd. 114/1957) differs in its nature from the first report of the Committee, which dealt with aspects of the law of reparation. It purports to be purely on a question of procedure. Though the Committee's original purpose was to deal with questions of substantive law, the present question referred by the Lord Advocate is one which is properly dealt with by a body of some standing, as the confusion which exists is the result of many factors. The Sheriff Court Act, 1907, is the scapegoat for many anomalies and uncertainties in the law, and this is certainly one of the cases where it has to bear a certain proportion of blame, although it was not the only sinner. The Committee have certainly taken a broad axe to reform the law in advising that the distinction between actions of removing and actions of ejection should be abolished. Our ancestors of feudal days might turn in their graves at the suggestion. An ejection is *inter alia* a subsequent step to a decree of removing. But the ease of advancing the defence in court that, when an action of ejection is brought, it should have been one of removing, or vice versa, makes it only too familiar in our day, as the Committee appreciate in paragraph 14 of their report and in their suggestion that the service of a notice of removing should not be held to imply acknowledgment of title. This may be said to be the real justification for their solution. What is required is that the defender should be given an opportunity for stating his substantive defence and even a person who is alleged to be in possession *vi aut clam aut precario* usually has some sort of excuse to advance. There seems, therefore, a good justification for the Committee's view that " the distinction between actions of removing and actions of ejection and between the different forms of removing should be abolished and that there should be one form of action for use in all cases where it is desired to recover possession of heritable property from an occupier."

The consequential changes seem to be logical. Writs for less than a year are to go to the Small Debt Court (with possibility of transfer to the Ordinary Court) but the scheme of having an initial writ in Ordinary Court form in the Small Debt Court is an innovation, for it may lead to more elaborate pleading being needed in defence. The suggested simplification and standardisation of notices of removing is all to the good. On caution for violent profits, the Committee recommend that it should be exigible in ejections (as there is a doubt on the point) and indeed it is difficult to see why a squatter should be in a preferable position.

The Committee deliberately refrained from touching the Agricultural Holdings Acts, probably justifiably, but some of their reforms can scarcely help having repercussions on these Acts.

It is to be hoped finally that the authorities act promptly on the Committee's suggestions, if they approve them.

S. G. K.

In its Third Report (Cmnd. 141/1957) the Law Reform Committee for Scotland considers the rules governing the date from which interest on an award of damages may be ordered by the court to run. The Committee examined the English rule empowering the court to award such interest from the date on which the cause of action arose, but rejected it on the ground that "cases must be rare in which it would be equitable that a defender should be found liable to pay interest on an award of damages from a date earlier than that on which he had received a formal claim for payment by being cited." It followed in the Committee's view that the earliest date from which the court should be empowered to award interest was the date of citation. The Committee justify this proposal on the practical ground that "it would remove the interest which a defender at present generally has in delaying proceedings." It is envisaged that this power should be a discretionary power only—"we assume that the normal practice of awarding interest only from the date of the final decree would continue except where the defender had caused unreasonable delay."

This proposal is a step in the right direction, but no more than a step. The Committee is obviously reluctant to depart " from strict adherence to the principle at present accepted in Scotland that interest is not payable on damages until the amount of the damages is liquidated." There is little to be said for this so-called " principle," which is entirely out of harmony with the real purpose of an award of damages. The Committee would have been better to declare that on principle interest should run from the date when the cause of action arose. From the practical standpoint this solution is to be preferred. It is a clear-cut rule with an ascertainable theoretical basis. It does not open the way to futile and expensive disputes as to whether the defender's delay has or has not been unreasonable. Moreover, there is as often cause to complain of dilatory tactics before the intimation of court proceedings as after it. Liability for interest from the date the cause of action arose, preferably interest fixed at a relatively high rate, would diminish the tendency of defenders to exploit the natural reluctance of pursuers to embark upon the expense of court proceedings.

A. E. A.

CURRENT PERIODICAL LITERATURE

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MENS REA AND NEGLIGENCE

Most people in this country are perhaps not very sympathetic towards newspapers when they get on the wrong side of the law and have damages awarded against them in libel cases or incur penalties for contempt of court. It is possible no doubt to be too severe, but the danger of muzzling the press, about which journalists are naturally eloquent, seems exceedingly remote compared with the danger that the course of justice may be perverted and the rights of individuals sacrificed in order to satisfy the idle curiosity of the public. The punishment imposed in *Regina* v. *Odhams Press, Ltd.* [1956] 3 W.L.R. 796, however, gives rise to adverse comment in both *The Law Quarterly Review* (January, 1957) and *The Modern Law Review* (May 1957). In this case a Sunday newspaper, no doubt with the object of discouraging sexual vice, published an article, under the heading "Arrest this Beast," denouncing a certain man as being engaged in the business of brothel-keeping, describing most inaccurately his criminal record, and urging his prosecution. In point of fact, the man in question had already been arrested, and moreover committed for trial. The publishers, the editor and the reporter concerned were brought before the Divisional Court and, in spite of their apologies and their contention, which was not disputed by the Attorney-General, that they had no knowledge of the pending criminal proceedings, they were held to be guilty of contempt and each heavily fined. Anything more calculated to prejudice a fair trial could not well be imagined, according to Lord Goddard C.J. It was no defence that the intention to influence the course of justice or prejudice an accused person was lacking. The test was whether the matter complained of was calculated to interfere with the course of justice, not whether the authors and printers intended that result.

The Law Quarterly Review maintains in an editorial note that, although in the particular case there had clearly been negligence on the part of the editor and reporter, because it must have been apparent that charges were at least impending, it is unnecessary for the law to be as Draconian as it now is in order to guard against any possible pollution of justice. The principle that anyone who writes or says anything in the most complete innocence may be guilty of contempt of court if proceedings, of which he knows nothing and which he had no reason to anticipate, are imminent, "does not err on the side of moderation." The suggestion is made that an editor should only be liable if he is careless in publishing prejudicial matter. Mr. J. E. Hall Williams takes a similar view in *The Modern Law Review*.

In spite of the apparent fairness of the rule suggested, it might be hardly satisfactory in practice. If the law required proof of knowledge in every case, as *The Law Quarterly Review* admits, the effect would be to encourage ignorance on the part of editors and reporters, and if reasonable diligence merely in ascertaining the facts were required standards of care would be likely to deteriorate. Nor is it perhaps wholly unfair that newspapers should be subject to absolute liability if they publish matter of the kind complained of in *Regina* v. *Odhams Press, Ltd.* It is not their business to repress crime, and in particular it is not their function to denounce individuals whom they believe to have committed offences. If a person is of good character the law of libel may protect him. If he is not, then the great power wielded by the press may be used to hound him without the smallest regard for decency or justice unless the courts are willing to take stringent measures to protect him at least from prejudice at his trial. "We do not mean to say," observed Lord Goddard delivering the judgment of the court, "that a newspaper may not expose and comment on someone's conduct which they believe to be fraudulent or otherwise criminal, but if they do, the comment should be made with proper restraint, taking care especially to refrain from publishing matter of which the law forbids evidence being given at the trial. It is a perilous adventure which they undertake at their own risk. . . ."

Editors who fear they may be penalised when they are entirely innocent of any intention to do harm, or even of carelessness, have no real ground for concern. If they want to expose someone, let them make quite certain beforehand that criminal proceedings against him are not pending. If there is a possibility of his prosecution, let them use the most extreme circumspection in what they publish, and in case of doubt let them refrain from publication and pursue their worthy objects of promoting public virtue or increasing the circulation of their papers in another way. It would scarcely be suggested in the case of a drunken motorist that he was, or ought to be, entitled to acquittal because he had consumed some unusually strong liquor, even though he had no reason whatever to suspect it was out of the ordinary. At the most, that might be regarded as a special reason for not disqualifying him. Why should those who choose to employ the equally, or more, dangerous weapon of newspaper publicity not incur liability for harmful consequences that may ensue, whether or not they were intended or could have been avoided by taking proper care? The severity of the punishment will, of course, depend on the circumstances, including the degree of negligence shown, if any.

Regina v. *Odhams Press, Ltd.* raises again the issue of *mens rea*. *The Law Quarterly Review* and Mr. Hall Williams agree in thinking the judgment to be unsatisfying because it fails to analyse the conception of *mens rea* in terms of recklessness or negligence, and assumes that, intention to cause prejudice not being an essential element in constituting the crime of contempt of court, all non-intentional statements which may affect a trial are necessarily criminal. Previous cases where contempt has been established might be explained, according to *The Law Quarterly Review*, as involving carelessness, and an analogy might be found in the law relating to manslaughter, where the *mens rea* does not consist in an intention to kill, but is found in the negligence of the wrongdoer.

It is clear that *mens rea* may exist although the factual knowledge normally needed to form intent is lacking, where for example the accused deliberately abstains from informing himself of a certain fact (*Bosley* v. *Davies* (1875) 1 Q.B.D. 84; *Redgate* v. *Haynes* (1876) 1 Q.B.D. 89). Or again where, as in a case of culpable homicide, there is present a high degree of negligence, amounting to recklessness (*Paton* v. *H.M. Advocate*, 1936 J.C. 19; *Andrews* v. *Director of Public Prosecutions* [1937] A.C. 576). But the former exception is only apparent, for the law cannot allow a man who purposely shuts his eyes to claim the benefit of blindness, while the latter exception, which is real, is due no doubt to the sanctity attached to human life or other special considerations. There is no basis for saying that where negligence only, or even in general recklessness, has been proved the *mens rea* required to make an act criminal is ever established at common law. The grossest negligence, for instance, on the part of a person receiving stolen property, without knowledge that it is stolen, will not make him guilty (*R.* v. *Havard* (1914) 11 Cr.App.R. 2). It is most important that the term *mens rea* should not be used in a loose sense, in case things which must be kept poles apart if injustice is not to occur, like dishonesty and carelessness, are to become confused with each other. The whole purpose which the doctrine of *mens rea* serves is to enable a distinction to be made between an act done with a particular intent, and so knowledge, on the one hand, and a similar act done through accident, or mistake, or negligence on the other hand. Either *mens rea* is required to constitute a crime, or it is not. If it is, then, apart from cases where the duty to take care is of such a nature that reckless action is itself culpable, the crime cannot be committed without guilty intent, and therefore the factual knowledge necessary before intent can be formed must be established. Negligence here is always a defence, since intent excludes it. On the other hand, if *mens rea* is not required, the mere doing of the act prohibited is criminal in itself, provided it is done voluntarily by a person responsible in law for his actions. Questions of intent, of factual knowledge, and of negligence are irrelevant, except in considering punishment.

So far as common law offences are concerned it cannot be doubted that *mens rea* is required in all, or practically all, cases, whether in the sense of wrongful intent or of recklessness. The difficulty arises when it has to be decided whether a statutory offence requires or does not require *mens rea*. In *Roper* v. *Taylor's Central Garages (Exeter), Ltd.* [1951] 2 T.L.R. 284 Devlin J. analysed the different degrees of knowledge which are applicable to statutory offences involving proof of knowledge. He distinguished between (1) actual knowledge; (2) knowledge, as he calls it, of "the second degree," where a person deliberately shuts his eyes to an obvious means of knowledge or refrains from making inquiries the result of which he does not care to have; and (3) what he calls "constructive knowledge," where a person merely neglects to make such inquiries as a reasonable and prudent person would make. There is a vast difference, as he points out, between (2) and (3). "The case of merely neglecting to make inquiries is not knowledge at all—it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law." This analysis has been criticised in *The Modern Law Review* by Dr. J. Ll. J. Edwards ("The Criminal Degrees of Knowledge," (1954) 17 M.L.R. 294), who comes to the conclusion after a study of the case law that "Devlin J.'s exclusion of negligence from this particular expanse of criminal liability, though deriving sporadic support, is in direct conflict with the majority of dicta dealing with offences of the very kind referred to by Devlin J., in which negligence has been stated to be a culpable state of mind." Dr. Edwards, however, admits that the sufficiency of negligence as *mens rea* would appear to be limited to a special class of statutory offences, based on " permitting," " suffering " and other similar expressions.

There are undoubtedly a number of cases from which the conclusion can be drawn that a person may be guilty of an offence by permitting or suffering something to be done, where he has only the " constructive knowledge " mentioned by Devlin J., that is to say where he is negligent. Thus it was decided by the House of Lords in *Houston* v. *Buchanan*, 1940 S.C.(H.L.) 17 that the owner of a motor-vehicle who handed over complete control of it to another had permitted the other to use it for a purpose not covered by third-party insurance in breach of his statutory duty under section 35 of the Road Traffic Act, 1930, although the owner was unaware that it was being used for such a purpose. The ground upon which the owner was held liable was his failure to take reasonable care to ensure that the vehicle was not used without insurance cover. It was no defence to show that the owner did not intend to give permission to use the vehicle in contravention of the statutory requirement, nor give express permission for such use, nor even know of it. Permission was inferred from the fact that the vehicle was handed over in such a manner as to sanction general use. Again, in *Clydebank Co-operative Society* v. *Binnie*, 1937 J.C. 17, the owners of a car were held to have been properly convicted on a charge of causing or permitting it to be used as an express carriage without the required licences, in circumstances in which they knew or ought to have known that it was being used in contravention of sections 67 and 72 of the Road Traffic Act, 1930. The ground of this decision also was failure on the part of the owners to take reasonable precautions to ensure that persons by whom their car was hired did not use it in a manner contrary to law.

But cases of the sort just mentioned do not support Dr. Edwards's argument that negligence can be designated as *mens rea*. The issue of *mens rea* did not arise, for the statutory provisions in question excluded *mens rea*. Negligence entered into this case only because, as the judges, both in the Court of Session and the House of Lords, agreed, the owner of a car might " permit " it to be used in the sense of the statute by tacit omission, that is by neglecting to restrict its use. Thus there is nothing in the cases referred to by Dr. Edwards that conflicts with Devlin J.'s dictum in *Roper* v. *Taylor's Central Garages*. It is correct to say that negligence has, generally speaking, no place in the criminal law. But, of course, a statute may make it an offence to be negligent. It can do so either expressly, as careless driving is made an offence by section 12 of the Road Traffic Act; or it can do so indirectly by making it an offence to permit something to be done, which implies that the offence can be committed if reasonably careful steps are not taken to ensure that the prohibited act is not done.

Some doubt, however, arises whether the word " permit " may be construed to cover negligence by reason of the recent decisions in *James & Son, Ltd.* v. *Smee* and *Green* v. *Burnett & Chippeck Bedding*

Co., Ltd. [1955] 1 Q.B. 78. In these cases employers were charged under regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, which made it an offence to use or cause or permit to be used a vehicle with defective brakes. It was decided in *Green* v. *Burnett*, where the charge was one of "using," that the fact that the defect arose from circumstances over which the employers had no control was not a ground for acquittal. The charge in *James & Son, Ltd.* v. *Smee*, where the facts were somewhat different, was one of "permitting" the use. It was held that the prohibition was absolute and the employers would have had no defence if they had been charged with "using" the vehicle in contravention of the regulation. But the word "permitting" imported a state of mind, and in the absence of evidence that the employers knew that the vehicle was being used with defective brakes they were not liable. Parker J., who delivered the judgment of the Divisional Court, stated that it was not enough that the vehicle in fact had defective brakes and that its use was permitted by the employers. They must be shown to have permitted the use in contravention. He added that "knowledge" includes the state of mind of a man who shuts his eyes to the obvious and does not care whether his servant commits an offence or not.

At first sight the case appears to decide that *mens rea* is necessary when the charge is one of "permitting," and either actual knowledge of the contravention or else a state of mind equivalent to actual knowledge on the part of the accused must be proved. The alternative requirement mentioned by Parker J., it will be observed, is closely similar to what Devlin J. called "knowledge of the second degree" in *Roper* v. *Taylor's Central Garages.* Such was the meaning which the High Court of Justiciary attached to *James & Son, Ltd.* v. *Smee* in *Hunter* v. *Clark*, 1956 J.C. 59, where a partner of a firm owning a lorry was charged with causing or permitting the driver to use it with defective brakes. It was conceded by the Crown, in view of *James & Son* v. *Smee*, that, in so far as the charge was based on permission, it was necessary to prove knowledge of the defect. The court accepted the argument that a conviction on the alternative of "causing" the driver to use the vehicle in contravention of the regulations should be upheld, although the appellant could not be convicted of "permitting" the use since he did not know of it.

There is some difficulty in seeing how *James & Son, Ltd.* v. *Smee* can be reconciled with *Houston* v. *Buchanan* and with *Clydebank Co-operative Society* v. *Binnie* and a number of English cases involving similar charges (*Goldsmith* v. *Deakin* (1933) 150 L.T. 157; *Newell* v. *Cross* (1936) 52 T.L.R. 489; *Browning* v. *J. W. H. Watson, Ltd.* [1953] 2 All E.R. 775). The same expression, "uses or causes or permits to be used," appears in the Motor Vehicles (Construction and Use) Regulations and in the various sections of the Road Traffic Act, and it would be anomalous if they were to be construed differently. It is strange also that where the words "cause" and "permit" are thus juxtaposed one should be held to import an absolute prohibition, excluding *mens rea*, and the other not. As Lord Sorn, who dissented in *Hunter* v. *Clark*, pointed out, if the regulations prohibit, not permission to use, but permission to use in contravention, then we ought surely to interpret "cause to be used" as meaning cause to be used in contravention. "To 'cause' the user," said Lord Wright in *Houston* v. *Buchanan* (at p. 39), " involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To 'permit' is a looser and vaguer term." (*Cf. Shave* v. *Rosner* [1954] 2 Q.B. 113.) *Hunter* v. *Clark* implies just the contrary. No doubt the High Court of Justiciary was placed in some difficulty when *Hunter* v. *Clark* was before it by *James & Son, Ltd.* v. *Smee* and the concession made by the Crown as to the effect of that case. It might, however, have been distinguished on the facts. Moreover, Parker J. perhaps did not mean to say that a person could not in any circumstances be held to permit another to use a vehicle with defective brakes unless he had actual knowledge, or " knowledge of the second degree," that is in the absence of *mens rea*. The case may have turned on the fact that there was nothing to indicate any negligence on the employers' part. It is to be noted that Parker J. distinguished *Browning* v. *J. W. H. Watson, Ltd.* (*supra*) on the ground that there it was the failure of the respondents' responsible officer to take reasonable precautions that constituted the permission. He thus apparently recognised that to permit something it is not necessary to know the facts, and that negligent omission to inform oneself may be sufficient. If that is so, then *mens rea* is not required, since mere negligence can never amount to *mens rea*.

The result of the cases of *James & Son, Ltd.* v. *Smee*, *Green* v. *Burnett* and *Hunter* v. *Clark*, taken together, is that, where a vehicle driven by an employee has defective brakes, his employer is under an absolute liability when the charge brought against him is one of " using " the vehicle, provided the employee is driving on the employer's business, and similarly where the charge is one of " causing " the vehicle to be used. But where the charge is one of " permitting " the vehicle to be used, the employer is not liable unless he has actual or imputed knowledge of the defect, or alternatively unless he ought to be aware of the defect and is negligently unaware of it. It cannot be said that this is a satisfactory result, especially if the first of these latter alternatives is correct, for in that event an employer can never be convicted of " permitting " except where he deliberately allows his vehicle to be used with defective brakes, which, as the Lord Justice-General remarked in *Hunter* v. *Clark*, will seldom occur. It seems plain enough that the object of the regulations in question is to provide for different modes of committing the same offence, and not to set up different standards of liability. In *Reynolds* v. *G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135, where a company was charged with using a bus as an express carriage contrary to section 72 of the Road Traffic Act, Lord Goddard C.J. observed (at p. 147): " I will certainly be no party to holding a man guilty or not guilty of this offence according to whether he is charged with using or permitting the use. That would be reducing the law to an absurdity." Nevertheless, Lord Goddard was a member of the court which decided *James & Son, Ltd.* v. *Smee* and *Green* v. *Burnett*. His first thoughts appear preferable to his second.

The opinion may be held that, when a charge under these regulations is brought, the prosecution should only have to establish (a) that the vehicle was used on the road with defective brakes, and (b) that it was used by or at the instance or with the permission of the accused, whether or not the accused knew or ought to have known of the defect. It might be argued, if it were not for the decided cases, that, on a proper construction of the regulations, the offence is committed if the owner of a vehicle allows it to be used *when* it is in a condition that contravenes the regulations and not only if he allows use *in contravention* of the regulations. But it must be admitted that this argument is scarcely open at present. The nearest judicial approach to acceptance of it to be found seems to be a dictum of Lord Carmont in *Houston* v. *Buchanan*, to the effect that there is an obligation on a person who parts with the control of a vehicle, without any definite arrangement as to use, to see that it is not used in contravention of the statutory requirement relating to third-party insurance.

No doubt, if the construction of the Motor Vehicle Regulations and of the various sections of the Road Traffic Act expressed in the same terms which has been suggested above were adopted, some instances would occur where it would seem unfair to convict. But no more unfair than under the rule laid down in *Green* v. *Burnett* and *Hunter* v. *Clark*. In perhaps nineteen out of twenty cases arising from defective brakes the owner of the vehicle and not the driver, if he is a different person, is the more blameworthy, or at least has a share of responsibility, for the defect. Instances where the owner is charged but is not really at fault at all, as in *James & Son, Ltd.* v. *Smee*, where the driver failed to ensure that a brake cable between a lorry and a trailer was reconnected after the trailer had been uncoupled, are exceedingly rare. Even if a prosecutor sees fit to bring a charge in circumstances where there has been a purely technical breach of a regulation or statute, there is no necessity for the court to convict.

It is possible to suspect that authors of legal textbooks or articles in legal periodicals, and even superior courts, sometimes underrate the good sense of courts of summary jurisdiction, who are probably well able to distinguish between offences where a penalty is needed and other offences where none is required, or where it would be unjust merely to record a conviction. In laying down general rules, as in imposing maximum penalties, for the guidance of courts dealing with the owners and drivers of motor-vehicles, or indeed in other matters, it is wise to be severe and leave it to the courts which apply the rules to do so intelligently. There is every reason why drivers of motor-vehicles, and still more owners who drive or allow them to be driven by others, should be compelled to take all possible precautions to see that they are in safe condition. To permit an owner to offer as a defence to a charge that his vehicle was in a dangerous condition the excuse that he was unaware of the fact is just to open a door to evasion by them of their responsibilities. Courts of summary jurisdiction can be relied on, or one hopes they can, to fix a penalty that is in proportion to the degree of responsibility involved, which may be nil and may be no more than is involved in an omission to see that employees are kept up to the mark, or in lending a car to a friend who is not fit to have charge of it.

It is customary for judges in dealing with cases where absolute criminal liability may be imposed by a statute or regulation to pay tribute to the principle that a man is not to be held guilty of a crime in the absence of *mens rea* unless that is clearly the intention of the legislature. While it would seem almost indecent for the tribute to be omitted, one may occasionally detect a sceptical note in it. In practice courts, or rather Scottish courts, have almost invariably disregarded the principle. It is not easy to find reported cases where a construction in favour of the necessity of *mens rea* has been adopted, although at times there has been an acute division of judicial opinion, notably in *Mitchell* v. *Morrison*, 1938 J.C. 64. In England the far more numerous cases in which the question has been raised form a jungle into which only those with the courage and energy of Dr. Edwards venture to penetrate. We must add that it is very hard for other people to derive any great benefit from their efforts. Sometimes a court will decide in favour of absolute liability without making any difficulty about it. At other times a court, perhaps composed of the same judges, will come to an opposite conclusion when considering the same statute, or one as different from it as Tweedledum from Tweedledee, in consequence possibly of sympathy for someone who has been convicted without any apparent fault on his part. No doubt differences can be discovered in the particular statutory provisions under interpretation, or in the particular facts (which are after all never the same in any two cases) in order to account for the fine distinctions which have been drawn between one decision and another, but apart from producing subtle arguments the only result is to deprive the law of the certainty which is so much needed, not least in the region of those statutory offences of a quasi-criminal nature which occupy most of the time of summary courts.

Divergences of opinion on the subject have existed for a great many years in England. They do not seem to show much sign of ending, and it is hardly likely they will, judging from some of the recent decisions. The most that can be said is that there have been fluctuations and at certain periods courts have leaned one way or another. At times judges have favoured a sort of middle course between absolute liability and *mens rea* by taking the view that where an absolute prohibition is imposed by statute the consequence is only to shift the onus of proof and make it incumbent on the accused to show absence of knowledge or intent. This view was expressed in some recent cases, for instance *Harding* v. *Price* [1948] 1 K.B. 695, where a driver succeeded in establishing a defence to a charge of failing to report an accident under section 22 of the Road Traffic Act, on the ground that he did not know of it owing to the noise made by a trailer attached to his lorry. The same view was put forward again in *Reynolds* v. *G. H. Austin & Sons, Ltd.* (*supra*), one of the express carriage cases. There is no mention of the doctrine in *James & Son, Ltd.* v. *Smee* and *Green* v. *Burnett* (*supra*). But that does not mean that it has been abandoned—unfortunately we may think, since it introduces still another distinction calculated to cause confusion. The doctrine was propounded by Lords McLaren and Kinnear in *Gordon* v. *Shaw*, 1908 S.C.(J.) 17 and by Lord Salvesen, dissenting, in *Beattie* v. *Waugh*, 1920 J.C. 64, but it does not seem to have won approval in subsequent Scottish cases.

An instructive contrast with *Harding* v. *Price* is afforded by the robust decision in *Howman* v. *Russell*, 1923 J.C. 32, where it was held that the ignorance of a driver that his rear light was not lit was no defence to a charge of driving without one. "The question," said the Lord Justice-General (Clyde), "is not whether the accused was wilful (which in this case he certainly was not) or negligent (of which in this case I see no sign), or had any intention of contravening the statute or the regulation (it is common ground, I think, that the accused in this case was innocent of any such intention). The question is whether he was driving a motor-car which—for whatever reason—did not have a lighted lamp at its rear. If he was, he contravened the regulation and statute, however technical his offence, and however inappropriate for either prosecution or penalty the case may be."

There can hardly be much doubt whether, from the point of view of those who sit on the bench in summary criminal courts, *Howman* v. *Russell* or *Harding* v. *Price* is the more helpful case. Scores of charges like these, or of a similar kind, come before the courts every day. In the great majority of cases there is a plea of guilty, and it is common form for the accused to state by way of mitigation that he had no reason to suppose his rear light was out, or that he had been involved in an accident, and so on. Probably it does not occur to most people that such an excuse could conceivably be a sufficient defence to the charge. Why should it? Why should the ordinary person, when he reads a complaint which charges him simply with committing an offence by driving a car without a rear light, suppose that it does not mean what it says? Of course, if he is acquainted with the law, he will not be under the delusion that words necessarily mean what they say. Other people, again, who may feel inclined to plead not guilty, refrain because they prefer to have the matter disposed of without trouble. If, however, the principle of *Harding* v. *Price* were applied, the court would not be able to accept the plea of guilty with such an explanation, and the case would have to go to trial unless the explanation were withdrawn. Since it is easy to advance and often difficult to contradict the excuse of ignorance, the practical result would be that the enforcement of the law would be hampered, and much inconvenience caused, with little advantage to honest people. Indeed that is perhaps an understatement, and if the principle were taken seriously the administration of summary criminal justice might be rendered impossible, at any rate in Scotland.

When Parliament imposes a prohibition against doing one thing, or an obligation to do another thing under the sanction of a penalty on owners and drivers of motor-vehicles, and generally on employers, traders, shopkeepers and others, its purpose is normally to discourage negligence as much as disobedience. The two purposes may be difficult to distinguish from one another. In everyday language one would describe a farmer who fails to complete and send in a form required by the Department of Agriculture as "careless," but "carelessness" here covers both failure through inadvertence to attend to a duty and also conscious omission to perform a duty, and who can tell, including the farmer himself, exactly where the one ends and the other begins? It would not make sense to treat an intentional breach of this kind in a totally different way from a non-intentional breach, and to make it necessary for *mens rea* to be proved in the first case but not in the second. Nor is it practicable to try to draw hard and fast lines of division between offences, according to the seriousness of the penalty or the presence or absence of moral culpability. Minor offences may involve cumulative penalties, the total amount of which may be very heavy, and it is a matter of opinion whether an offence, dangerous driving let us say, infers moral culpability or not.

It may well be that the only method by which a consistent rule can be established and maintained with regard to all statutory offences, whether of a major or minor nature, is for the present, somewhat unrealistic, principle of interpretation in favour of *mens rea* to be abandoned, and for courts to presume on the contrary that *mens rea* is not required for the proof of any statutory offence, unless such a requirement is expressly stated or necessarily implied in the statute. There seems to be no sufficient reason why, when Parliament makes it an offence to do or not to do something, and omits to insert in the Act a qualification declaring that intent is necessary, or ignorance or negligence a defence, a court should insist on reading such a qualification into the Act. This can only be justified on the ground that omission of the qualification is so extraordinary that Parliament must be held to have forgotten it. But there is nothing extraordinary about absolute criminal liability nowadays, and Parliament is more precise and explicit than it used to be in defining new offences and providing for exceptions to them. Such a reversal of the present rule of interpretation would not, one may suppose, lead to injustice if courts exercised their discretion sensibly. The principle according to which *mens rea* is an essential constituent of crime at common law must be preserved, but it only tends to the weakening of this great principle if it is associated with a mass of statutory offences to which it has no proper application.

SUMMARIES

By S. G. Kermack, C.B.E., M.A., LL.B., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Bar Association Journal. Vol. 43, Nos. 2 and 3.

The American Bar finds it suitable to produce a monthly periodical. It differs from the legal review in that it casts its net wider and consists of shorter and more general articles, and sponsors a public spirit among its members. Such a well-known figure as Chief Justice Vanderbilt of New Jersey deals with recommended changes in legal education. In perusing an article on the desirability of more uniform law of testation, however, one is a little horrified to find it said that in Scotland “ the male children inherit first, in their order, then females,” and Scots law dismissed with that! Leaving aside such a gaffe, the reader can find much interesting discussion. The *Journal* is perhaps particularly important to this country when we realise that the association is this year taking the remarkable step of holding the second part of its Annual General Meeting in Britain. Its members are warmly welcomed.

The British Journal of Administrative Law. Vol. III, No. 2. Spring, 1957.

The bulk of the Journal is taken up by the Administrative Law Reports. These cover a very wide field and do not ignore domestic tribunals, international bodies or of course the civil courts. The publishers have arranged for considerable additions for the future and invite further extension. In the nature of things, many of the decisions turn primarily on questions of fact but officials, pleaders before particular tribunals or the tribunals themselves will neglect at their peril the reports dealing with their own particular subject-matter. The lawyer may get some surprises. For example, a National Insurance Commissioner has power to decide whether parties in Scotland are or are not married by habit and repute. It is an interesting proof of the importance now attached to this subject that two such digests are now available, as *Public Law* publishes a corresponding analysis from a slightly different standpoint.

New tribunals are being created during every session of Parliament and the Journal does well to give analyses of these. The latest is the Performing Rights Tribunal established under the Copyright Act, 1956, and an article gives what the industry might call a preview of its probable operations.

Canadian Bar Review. Vol. xxxv, Nos. 1 and 2. January and February.

The Canadian Bar makes itself responsible for a *Review*. The articles on bar organisation which it contains must therefore be important from a general point of view. It is obvious that in both Canada and the United States a Bar Association is a much more active and directive body than it is on this side of the Atlantic. The present numbers contain a full report of its annual meeting and an article by an ex-secretary on the present need for change. The need for a *Journal* in addition to a *Review*, as in the United States, research and finance are subjects figuring prominently. In Britain, we are perhaps established on different and more conservative lines but it is right that we should not ignore the existence of the ways of regarding these things on the other side of the ocean. The *Review* of course also contains learned studies and the February number pays Professor Hamson and itself the compliment of publishing his striking study of how the Courts might be related to the Executive in a way similar to that in which it is to the police power.

Indian Law Quarterly Review. Vol. I, Part IV. October–December, 1956.

The addition of a new periodical in legal circles is always an interesting event and we extend hospitality to this venture from New Delhi. No doubt Indian lawyers will not throw off easily their English affiliations. Eventually they will expect to write more in the languages of India but it is a compliment that they wish to continue publications in English, and that they are able to do so with such facility. We would be unwise to ignore what they have to contribute to the common stock. The writer claims that it stands for " the development and improvement of law, to establish the Rule of Law and to encourage scientific police investigation." It is perhaps in this last field that the articles show the keenest interest and they relate the questions raised thereon to the rights of the individual. Interesting also are the incidental references to the earlier civilisation and religion of the subcontinent. The *Review* would do well however to give the names of the contributors of the different articles.

International and Comparative Law Quarterly. Vol. vi, Part 2. April, 1957.

For those who are interested in " customary " law, an article on Malayan law contributes to the study of the interaction of native custom (*adat*) with more developed systems. It may be noted that a comparable article on African customary law appears in the May number of the *Modern Law Review.* On a different plane, there is a discussion of the important question of the recognition in private international law of foreign adoptions, in which legislation, so far introduced only in New Zealand, may be required. A decision of the International Court of Justice reported seems to show that there is an " administrative law " in the U.N. as in other spheres.

The Modern Law Review. Vol. 20, No. 2. March, 1957.

A general criticism by Professor Gower of English practitioners' and courts' lack of interest in periodical literature is made in a note on *Ashdown* [1956] 3 W.L.R. 1104 in the Court of Appeal. This was a case about a danger notice on a railway siding and an appeal had not been expected. It is therefore fair to mention that considered comments are made on, *inter alia*, *Wood* v. *Wood* [1956] 3 All E.R. 645—children's position where father's domicile different; *St. John Shipping Corporation* v. *Joseph Rank, Ltd.* [1956] 3 W.L.R. 870—illegal overloading a ship as affecting right to sue under contract; and *Re Scullard, deceased* [1956] 3 W.L.R. 1060—domicile of wife after death of husband.

An article in the *Review* reverts to the *Bonsor* case [1955] 3 W.L.R. 788, and considers the possible advantages of statutory definition of trade unions' legal position. Professor Montrose deals with the difficulty of finding a meaning for the ambiguous phrase *ratio decidendi* where House of Lords judges say different things.

New York University Law Review. Vol. 32, Nos. 2–4. February–April.

As stated in noting the January number of this *Review*, the main feature of substance is the 1956 Annual Survey of American Law. It is an exhaustive examination, extending to some five hundred quarto pages, and specialists can dig out some lines of decision which would help in British law. The subjects in these three numbers are (1) Government Regulation, Torts and Family Law; (2) Trusts, Estates and Procedure; (3) Commercial Law and Taxation. Among the other articles, attention of students of social science might be directed to one on the termination of parental rights in adoption.

Revue Internationale de Droit Comparé. Vol. IX, No. 1. January–March, 1957.

The Bulletin of this classic *Review* is devoted to the full report of the Society's five-day conference at Aix-en-Provence on various topics of South American law, an interesting part thereof touching on constitutional law in a continent where dictators and revolutions play a considerable part. The articles in the *Review* are, following civil law practice, classified as between "Doctrine" and more practical topics. The former, for example, discusses the question of whether the non-contentious work of the courts ("gracieuse" or "volontaire") falls under jurisdiction properly so-called or under administration. The latter puts forward the scientific proofs now available as evidence of paternity.

Western Political Quarterly. Vol. X, No. 1. March, 1957.

This number of the *Review* provides much material for students of American politics. It suitably deals generally with the 1956 elections in the western states in a series of articles which extends to a hundred pages and treats of eleven different states by separate authors. A factual report of the doings of Congress in the pre-election session is continued by Floyd M. Riddick. Specifically interesting for European readers and lawyers is an article on the position of the higher civil service in France in which attention is drawn to the predominance of law study in their training. Contemplated changes in recruitment for the service are reviewed.

Periodicals also received: *The American Journal of International Law*, *Oklahoma Law Review*, *La Justicia*, *Connecticut Bar Journal*, *Italian Affairs*, *Jus* (Milan), *Public Law*, *The Medico-Legal Journal*, *Textes Législatifs Étrangers* (Brussels), *Documentation Juridique Étrangère* (Brussels).

RECENT LITERATURE

International Law Opinions. Selected and annotated by Lord McNair. 1956. Cambridge University Press. 3 volumes. Price £9 9s. net the set.

The warmest possible welcome from all students of international law was assured for the publication of these *International Law Opinions,* and it is gratifying to be able to endorse unreservedly every expectation of excellence. In the three volumes there are over 1,100 pages of Reports tendered by various legal advisers to the Crown, most of them hitherto unpublished; a prefatory " Note on the Sources " of great value to any future worker in this field; an Appendix giving brief particulars relating to the legal advisers concerned; and an Appendix reprinting the author's address to the Grotius Society in 1953 on " The Debt of International Law in Britain to the Civil Law and the Civilians." This impressive achievement deserves a notice of more than ordinary length.

The selection of the material—in itself a formidable labour—is the work of Lord McNair, who for many years has been one of our foremost international lawyers, sometime Whewell Professor at Cambridge, and a former President of the International Court of Justice. His wide experience and insight are sufficient surety that the task of selection has been done judiciously. The Reports—or Opinions, as Lord McNair prefers to call them—are set out verbatim in systematic form. The observations by which Lord McNair introduces or annotates them are in the trenchant and scholarly style which one might expect of so distinguished a commentator.

International Law Opinions represent, in the words of the Preface, " an attempt to trace the development of public international law in Great Britain as evidenced by the opinions given to the Crown by its Law Officers and certain other occasional legal advisers during the past three to four centuries, and more particularly between 1782 and the end of 1902." In the period with which these volumes are mainly concerned the historian of international law could scarcely hope to find a comparable body of source material in the reports of decided cases. It is to the practice of the Government Departments most closely concerned with international relations that Lord McNair has turned to illustrate the developments which he records, and the reader will appreciate how well the author has been served by his main source of information.

No claim is made that these Reports are necessarily the law, although they are of obvious value in showing what the legal advisers of the British Government believed to be the law. When they were written the Reports were highly confidential. This factor, taken in conjunction with the uniformly high standard and the impartiality of the References to the Law Officers (particularly those by the Foreign Office), clearly made for objectivity. As Lord McNair points out, in that respect " they resemble judgments, not the arguments of a pleader." A further important quality which they share is that they are not abstract answers to hypothetical questions, but considered opinions on problems which arose in practice. Moreover, they are, for the most part, " not given merely *ad hoc* but as part of a system, with intent to create, as the French say of case law, *une jurisprudence constante*." These, briefly, are the merits which most of the Reports share. It may, however, be admitted that the value of these documents as sources of international law would be greatly enhanced if it were satisfactorily established that the government to which they were addressed had acted upon them. The task of pursuing that question in relation to a collection of Reports such as these would of course be immense: but it would not be entirely a work of supererogation. Lord McNair suggested in a passage in the Preface to his study of *The Law of Treaties* (1938) which he reproduces in the Preface to the work under review, that it is perhaps rather the province of the diplomatic historian. Even so, the correlation between advice and actual practice might yet usefully be investigated.

It may be a matter for regret that the Reports do not go beyond the end of the year 1902—the limit of the " open period " for the Foreign Office archives at the time of writing. Lord McNair does not embark on speculation concerning the wisdom of official retention of so lengthy a closed period. Few readers of these volumes may live to study the Reports which legal advisers may have given to the Government on recent aspects of our foreign relations. It is difficult to be convinced that we have more to lose than gain from a more liberal approach to the publication of opinions of the Crown's legal advisers. However, such a complaint seems churlish in view of the undoubted interest of the material which Lord McNair has selected. The publication of these Reports of the Law Officers has opened an extensive field of inquiry to students of international law for whom the Public Record Office may remain strange territory. This is the first systematic publication of this type of material, and it merits attention for that reason alone. The " Note on the Sources " draws attention to other printed sources of Reports by the Law Officers; but they are works on particular limited topics. One of them is Lord McNair's *The Law of Treaties* (1938). It must form a supplement to the present work, since a title " Treaties " is retained only *pro forma* and reference is made to the earlier volume which contains the relevant material. It is good news that a second edition of *The Law of Treaties* is in course of preparation.

The section headings cover most of the topics which would be dealt with in any comprehensive treatise on international law. However, because of the genesis of the Reports in problems arising from concrete facts, there are no sections dealing with theoretical matters such as the sources or subjects of international law, the relationship between international law and municipal law, the binding force of rules of international law, and so on. On the other hand, there is such a wealth of information of a more practical kind that the reader is amply compensated for the absence of more theoretical inquiry. Indeed, it may be considered that the very existence of the many thousands of opinions obtained by the Crown on questions of international law does much to attest the importance which British Governments through the years have attached to the rule of law in international affairs. They are, further, a salutary reminder of what a potent factor that law was in our foreign relations at a time when our standing as a major power was unquestioned. To use Lord McNair's words: "It is a delusion affecting the minds of many laymen and not a few lawyers that governments in the conduct of foreign affairs act independently and capriciously and without reference to legal principle. Those who have worked in, or in the archives of, the Foreign Offices of well-established States, realise that the ordinary, routine, non-political business of the world is carried on by Ministers of Foreign Affairs and their diplomatic agents against a background of law . . ." (Preface, Vol. 1, p. xvii).

As well as illustrating the views of the legal advisers of the Crown on matters of international law, *International Law Opinions* also furnish fascinating contemporary appraisals of many of the diplomatic controversies mentioned in the standard textbooks. The lawyer no less than the historian will benefit from a study of them. Some of the cases and incidents on which fresh light is thrown are discussed below: others include *The Alabama*, *The Charkieh*, *The Costa Rica Packet*, *The Creole*, *The Huascar*, *The Trent*, *Regina* v. *Anderson*, *Walker* v. *Baird*, to mention only a few. On one of the most celebrated of early diplomatic incidents, the assault in London in July, 1708, on the Ambassador of the Czar, which led to the passing of the Statute 7 Anne, c. 12, no Report by the Law Officers of the day was found: but a document from the Privy Council Unbound Papers is printed (Vol. 1, pp. 189–190). The arrest of Robert Vickery, better known to international lawyers as Mr. Gallatin's coachman, formed the subject of several Reports by the King's Advocate and the Attorney-General, who commented on the scope of the Statute 7 Anne, c. 12, and its declaratory nature. The problems arising from the detention in the Chinese Legation in London of Sun Yat Sen are indicated in the draft of a Despatch which the Law Officers approved (Vol. 1, pp. 85–87). The document is of interest in that it provides a clear example of what Sir Gerald Fitzmaurice has recently termed "the real basis of diplomatic immunity," that is, "the practical requirements of the diplomatic function" (*British Year Book of International Law*, 32 (1955–1956), p. 76, n. 2). The Despatch stated that diplomatic privileges and immunities "have for their sole object to secure for such Representatives complete freedom and independence in the discharge of their mission" (Vol. 1, p. 87). An earlier document of interest on the question of diplomatic immunity is the Opinion of the Doctors in 1571 on the charge of plotting against Queen Elizabeth which was brought against Leslie, Bishop of Ross, the Ambassador of Mary, Queen of Scots. The Doctors reported, in general terms, *inter alia*: ". . . we are of Opynnyon that an Embassador procuringe an Insurrection or Rebellion in the Prince's Cowntrey towards whome he is Embassador, ought not, *Jure Gentium et Civili Romanor.* to enjoye the Privileges otherwise dew to an Embassador; but that he maye notwithstandinge be ponished for the same" (Vol. 1, p. 186). It is pointed out that the Opinion was certainly wrong on the question of the Ambassador's justiciability in England and that it was not followed in later cases.

In addition to an understanding of the historical development in Great Britain of many rules of international law, the industrious reader is also led, through footnotes and comments, to a consideration of the present state of the law on most of the matters covered: and the references to contemporary authorities, mainly British, are numerous and characteristically perceptive. Two examples may be noted from the section on State Responsibility (Vol. 2, pp. 197 *et seq.*). The advice consistently given by the legal advisers of the Crown with regard to the responsibility of States for injuries to aliens arising out of insurrection, rebellion and civil war is lucidly summarised (Vol. 2, p. 245). This responsibility, it is stated, is not absolute but arises from fault on the part of the State in control of the area where the injury occurs. Territorial sovereignty carries with it not only rights but obligations with regard to aliens; and a helpful footnote sends the reader to the remarks of the Arbitrator in the *Island of Palmas* arbitration and to the Judgment of the International Court of Justice in 1949 in the *Corfu Channel* case (Merits). In this same section, under the heading " Miscellaneous," Lord McNair points out that it is surprising, considering the world-wide importance of the British insurance market, that authority is extremely scanty on the effect of the insurance of property with regard to State responsibility. The topic covers two pages (Vol. 2, pp. 290–292); and there are only two Reports, of 1817 and 1818, on the question whether the insurers of property which has been seized, destroyed or damaged have any *locus standi* independently of the owners of the property, so as to be able to invoke the support of their own government in a claim against another State. The general principle is stated to be that the insurers cannot expect to be in a better position than the owners and that it is for the government representing the owners to put forward the claim. The position of the British insurers of the Onassis whaling fleet provides a recent example of the type of problem involved. Lord McNair again directs the reader to the present by referring to the observations of the Foreign Secretary in the House of Commons on November 24, 1954, with regard to the *locus standi* of the United Kingdom by reason of British insurance interests.

The section on State Responsibility is, indeed, particularly informative; and although the Reports are confined to the " open period " they should provide useful material for the preparatory work of the International Law Commission in its study of this subject. The first Report in this section, dated 1832, is summed up in a way which should ensure attention for it. Lord McNair writes: " (i) A satellite State cannot evade its responsibility by alleging that the act complained of was done under the coercion of its big brother ":—and perhaps more enigmatically—" (ii) No Monroe Doctrine for Europe " (Vol. 2, p. 199). Lord McNair outlines some prescient impressions derived from a reading of the many Reports on State responsibility, underlining the reluctance and restraint which have characterised the attitude of the British Government towards the espousal and prosecution of claims by individuals against foreign governments. The short chapter on so-called " Calvo clauses " is admirably clear. Lord McNair points out that they have occasioned very few Reports by the Law Officers, and he suggests in a footnote that the reason may be that the British attitude to them soon became well established and any legal questions arising were dealt with by the Foreign Office's own staff. A footnote on p. 205 indicates that in its reply to the League of Nations Preparatory Committee for Codification in 1928 His Majesty's Government accepted as good law the decision of the Commissioners in the well-known arbitration concerning the *North American Dredging Company of Texas* in 1926. Lord McNair concludes his short examination of Calvo clauses with this observation: "The Law Officers do not appear ever to have formulated what is believed to be the accepted doctrine underlying the British attitude towards Calvo clauses, namely, that while an individual can validly waive by contract any of his own rights which but for such waiver would be exercisable by him, he cannot contract away any rights which may accrue *to his own State* by reason of such conduct towards him as amounts to an international delict." And he goes on to suggest why an individual claimant and his government may not see eye to eye on the question of official espousal of a claim: "It might well happen that he would prefer not to bring his own Government into the dispute, hoping that he would be able to secure a new contract or concession, whereas his own Government might consider that it ought to intervene diplomatically in order to maintain a proper standard of mercantile conduct" (Vol. 2, p. 206, n. 1).

Notwithstanding the theoretical importance and the practical implications of the question whether individuals may be subjects of international law, little light is thrown on it by the Law Officers. As Lord McNair indicates, some Reports touch the problem peripherally. The section on Calvo clauses is not without relevance: nor are some of the Reports on extradition. Thus, in 1875 one of the Law Officers and the Legal Adviser to the Foreign Office concurred in the view that the waiver by an accused of any right he might have to be first tried for the extradition crime in question would not bar a later objection by the British Government on the same point (Vol. 2, p. 60); and in 1896 the Law Officers stated "that as a matter of principle an individual cannot waive the stipulations of a Treaty" (*ibid.*, p. 63).

It may surprise Scots lawyers to read in the introductory note to the topic of Extradition that, with regard to Great Britain, "the key to the practice lies in the ancient writ of *habeas corpus*" (Vol. 2, p. 41): yet the jurisdiction conferred on the Chief Metropolitan Magistrate by the Extradition Acts, and the manner in which the statutory provisions have been operated in practice (see Professor T. B. Smith's comments on the recent Blierbach incident in *Public Law*, Summer 1957, pp. 117–118) do appear to bear out Lord McNair's view that the tests which must be satisfied before a person may be extradited are applied in the last resort by means of the writ of *habeas corpus*. A number of Reports illustrate the known reluctance of the British Government to admit that extradition can be granted or demanded in the absence of applicable treaty provisions.

The bond between allegiance and protection, discussed for example in *D. P. P.* v. *Joyce* in 1946, finds remarkable illustration in a series of Reports occasioned by the disturbed conditions in Upper Canada in and about 1838 (Vol. 2, pp. 143 *et seq.*). After an attentive consideration of Canadian objections the Law Officers reported that "an alien, a native of a State at peace with our Queen, and not in the service of a State at war with our Queen, who levies war within her dominions, is liable to be tried for high treason " (*ibid.*, p. 146). " The obligation of allegiance," they pointed out, " does not arise from the protection which *de facto* he has enjoyed, but from the protection to which he is entitled and which he might have enjoyed if he had thought fit " (*ibid.*, p. 147).

Among the acts and omissions of State organs and officials which form the first part of the chapter on State responsibility for delicts appears the " Plea of Self-defence or Self-preservation or State Necessity." The *Caroline* incident and *McLeod's* case have pride of place. The extracts which have been selected from the diplomatic correspondence are in the main drawn from Manning's *Diplomatic Correspondence of the United States, Canadian Relations, 1784–1860*. The essence of the plea of self-defence (a term which Lord McNair notes was preferred by Daniel Webster—and is to be preferred—to self-preservation) is contained in Webster's Note to the British Minister in Washington in 1841, which set out the famous formula requiring the British Government " to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation " (Vol. 2, p. 222). Also raising the plea of self-defence was the *Virginius* incident. The Reports which discuss it may also be consulted on the questions of piracy and denial of justice (Vol. 2, pp. 233–237). Another notorious diplomatic affair is found in the same section, under the heading " Damage by Mobs and Rioters," namely the *Don Pacifico* affair (Vol. 2, pp. 238 *et seq.*). Lord McNair introduces the Reports with the reminder that the incident " formed the occasion of Lord Palmerston's famous *civis Romanus sum* speech in 1850 in the House of Commons . . . and was probably the high-water mark of the very controversial Palmerstonian policy." The Reports themselves are described as disappointing, because no attempt was made to discuss either the exhaustion of local remedies or State responsibility for the supineness of higher officials. Finally it is remarked: " Lord Palmerston does not appear to have consulted the Attorney- or Solicitor-General " (Vol. 2, p. 238).

The topic of Denial of Justice is treated in a separate section. Like the matters covered in the section on State responsibility, it is a problem of day to day concern to Foreign Offices. The Reports in the Foreign Office archives are described as being very numerous but repetitious and dealing with very few specific points of law when compared with the variety and abundance of material available in the proceedings of claims commissions and other tribunals. Among the references to denial of justice in early sources, Lord McNair draws from Marsden's *Law and Custom of the Sea* the following: " In 1560, letters of reprisal granted by James IV of Scotland contain evidence of the existence of the concept of denial of justice and the need of exhausting local remedies; they recite that the grantee ' after suing at law and using all possible means of recovering [his ship] . . . has been made spoil of,' and the grant is based on ' denial of redress for injuries and of restitution of the good spoiled ' " (Vol. 2, p. 297, n. 1).

One of the features of the work which is perhaps open to criticism is the arrangement of the Reports and other material dealing with the acquisition of title to territory (Vol. 1, pp. 285 *et seq.*), although the reviewer is aware of the difficulties inherent in the Law Officers' apparent flexibility of terminology in this matter. Under the first heading, "Acquisition by Occupation, with or without Discovery," Lord McNair observes that the Reports by the Law Officers are surprisingly scanty. It is odd, therefore, to find a Report arising out of the early proceedings of the Berlin Conference of 1885—one of the Reports most relevant to acquisition by occupation (although the Law Officers term it "occupancy or settlement")—placed in the following section on "Acquisition by Cession on Conquest or otherwise." It is perhaps even more surprising to find this Report under the heading "Annexation" in view of the Note on the word "annexation" in which Lord McNair states that it "is hardly a term of art, and is perhaps used more by administrators and politicians than by lawyers." However, it must be admitted that the task of arrangement is made no easier by documents such as the Note by the Lord Chancellor, Lord Selborne, on pp. 289–290, which relates, in part, to what the Lord Chancellor termed "*annexations* of territory, properly so called." As it is, two of the four Reports on Acquisition by Occupation refer quite explicitly (and, it appears to the reviewer, exclusively) to annexation in the form of conquest followed by subjugation. The material under the heading "Acquisition by Occupation, with or without Discovery" is truly sparse. In the first of the two Reports which actually refer to occupation the King's Advocate contrasts "formal possession" with "real occupation"; and he makes it clear that by real occupation he meant actual occupation in the sense of physical occupation of the territory (Vol. 1, pp. 285–286). In the other Report the Admiralty Advocate used the phrase "settlement in the case of unoccupied land" in contrast with "cession or conquest in the case of territory already inhabited" (*ibid.*, p. 287). Certainly Lord McNair at the outset has put the most favourable construction on the documents printed when he writes that the Reports "may be said to reflect or support the general opinion that discovery in itself . . . merely creates a right . . . to establish a title to sovereignty by means of an effective occupation; and that effective occupation involves some course of administrative action of a permanent or frequently repeated character and, where it is humanly possible, a permanent settlement" (Vol. 1, p. 285). On this troubled question reference might usefully have been made to Professor Waldock's authoritative article on "Disputed Sovereignty in the Falkland Islands Dependencies," in the *British Year Book of International Law*, 25 (1948), pp. 311 *et seq*. Some pages further on in this section the reader will come across a number of Reports, under the heading "Islands, including Guano Islands," which *are* concerned with occupation as a mode of acquiring title and which might have been cross-referenced with the earlier thin section on occupation. The Index deals with the matter thus. Under "Acquisition of Territory" are to be found, *inter alia*, these two entries: "of *terra nullius*, *see* islands"; "*see also* occupation." Under "Occupation" is found, *inter alia*, "*see also* islands (Guano)." Finally with regard to the chapter on Islands, it may be doubted whether there is much of value in the prefatory lines before the first Report which are almost as inconclusive as the Report itself and hardly summarise its burden.

Reports on Territorial Waters are found in both Volume 1 and Volume 2. The extent of territorial waters is the main concern of the chapter in Volume 1 (pp. 329 *et seq.*). Most of the Reports on fisheries questions turned on the terms of treaties and few are included in this work. Reference is made to Fulton, *The Sovereignty of the Sea*, for British practice in fishery questions. The Reports in Volume 2 cover the question of jurisdiction in territorial waters (pp. 155 *et seq.*). One of the rare instances in which the opinion of the Scottish Law Officers was obtained was in connection with the confirmation of a by-law which the Fishery Board for Scotland proposed in 1888 for the regulation of beam-trawling in the estuary of the Clyde. The minor part which the Scottish Law Officers played in international affairs at that time is reflected in the limited nature of the question which the Secretary for Scotland submitted to them. The relevant passage from the Reference reads as follows: " Objections to the aforesaid proposed Bye-law have been made to the Fishery Board on these grounds: (a) That it is *ultra vires* of the Fishery Board by public international law; (b) That it is *ultra vires* of the Fishery Board by Statute; and (c) That it is not advisable in the public interest. The first of these objections has been referred to and decided by the Foreign Office; the third is a matter for the Fishery Board to decide on evidence, and for which the Board must be responsible; but on the second Her Majesty's Secretary for Scotland desires to have the opinion of the Scotch Law Officers of the Crown " (Vol. 1, p. 357). It may be added that in their Opinion the Scottish Law Officers took a much more liberal view of their functions than that suggested by the Secretary. One may surmise that the role of the Scottish Law Officers continues to be similarly circumscribed and that questions of public international law are rarely if ever referred to them. There may be more than one view as to whether this practice is defensible in principle. No estimate of the quality of the contributions of past Lords Advocate and Solicitors-General for Scotland can be made from the work under review because, as Lord McNair explains in the Preface, the additional time and labour involved precluded their consideration. Their selection and annotation remains a task for the future.

It is hoped that some indication of the comprehensive scope and interest of these volumes has been given. They are indeed a signal British contribution to the collections of source materials on international law. Yet we still lack our Moore, Hackworth and Hyde. There is continuing need for a complete " Digest of British Practice in International Law "; and it is also to be hoped that the invaluable series of digests and reports of international law cases, the *Annual Digest* and its successor the *International Law Reports*, may be supplemented by volumes covering the cases decided before 1919. The completion of these undertakings would go far to ensure that the classical period of international legal development in this country is adequately documented. Lord McNair's *International Law Opinions* will certainly remain unparalleled. This important and distinguished contribution to the literature of international law is one which no law library should be without and which no writer in the field can afford to ignore.

It may be added that the three volumes are produced in the handsome style associated with the Cambridge University Press.

I. C. M.

The Parliament House Book, 1956–1957. 1956. Edinburgh: W. Green & Son, Ltd. Two volumes. Price 65s. net.

It is very easy to regard *The Parliament House Book* as a mere collection of statutes and statutory instruments bound together, with certain other useful information thrown in for good measure. But when one remembers that these enactments are constantly being amended and that the effect of such amendments is noted and given effect to in the text of each annual edition of *The Parliament House Book*, one realises what an invaluable work of reference it is and what an immense amount of labour must be involved in its preparation. Where else, for example, can the practitioner consult an up-to-date version of the Rules of Court without having to wrestle with cuttings from Acts of Sederunt pasted on to the pages?

The new material appearing in this year's *Parliament House Book* includes Part V of the Administration of Justice Act, 1956, the Marriage (Scotland) Act, 1956, and the Valuation and Rating (Scotland) Act, 1956. The passing of the last-mentioned Act has involved extensive revisal of the Valuation and Rating section of the book and all matter repealed on or before May 16, 1957, has been deleted.

It can safely be asserted that this the 132nd annual volume of *The Parliament House Book* will be found as useful and reliable as its predecessors.

D. W. R. B.

Roman Foundations of Modern Law. By H. F. Jolowicz, LL.D., D.C.L., Late Regius Professor of Civil Law in the University of Oxford. 1957. Oxford: Clarendon Press. Price 35s. net.

Throughout his career, which was cut short by his untimely death in December, 1954, Professor Jolowicz had conspicuous success as an expositor of Roman law to English-speaking students. At first his own researches were directed towards the primitive legal system of the early Republic. Later he observed that over-concentration on the earlier history of Roman law and the relative ignoring of the law of Justinian and the later Commentators of the Corpus Juris were impairing the educational value of Roman law. For, as he said in his inaugural lecture at Oxford in 1948, "It is only when the Roman materials are seen in the light of subsequent Civilian developments that their full value for the understanding of the law can be realised" (65 L.Q.R., p. 336). Characteristically he set about writing a large work which was to survey the main institutions and rules of Roman law in so far as they had become the basis of modern continental legal systems. At his death only the first volume, which is now published, was completed.

The volume falls into two halves; the first deals with the Sources of Law and the second with the Law of Persons and Family Law (with the exception of Guardianship). The first half seems to the present reviewer to be the more interesting, because its content is not to be found in English books on Roman law. The author accepts the texts of the Corpus Juris as something given, and discusses various aspects of their subsequent application. With regard to the interpretation of the rules set out in the texts, the Roman jurists themselves evolved no coherent doctrine, being in this field particularly influenced by the practice of rhetoric. Many of the maxims which later commentators applied generally were originally limited to a particular field of law. Jolowicz shows that modern adherents both of a literal and of a liberal interpretation can find considerable Roman authority in support of their respective views.

In his discussion of the requirements for the recognition of a customary rule the author clearly demonstrates his mastery of the diffuse materials. He gives a rapid synthesis of the different opinions from the Glossators of the twelfth century to the Pandectists of the nineteenth century, supported by citation of the texts on which the various views were based.

The territorial and temporal limits of statutory rules and the distinction between public and private law are discussed briefly, for there is scant Roman authority on these matters. Equity as a source of law is described in a chapter which is a jewel of elegant compression. Probably the most striking chapter in the whole book is that on the Divisions of the law, in which Jolowicz tackles the vexed question of the nature of the category " Law of Persons." He shows that the modern law of Persons is made up of three ingredients (p. 69). " There is the conception that there are some rights which have a person or some facet of personality as their object; there is the allied, but separate, idea that some rights are without patrimonial value; and there is the really different idea that there are various conditions which may be called status, that need description because they influence rights and duties especially by defining capacity and incapacity." The first half of the book concludes with a discussion of certain conceptions concerning the effect of procedure on substantive rights, such as *litis contestatio* and *condemnatio*.

The second half of the book opens with a discussion of the law of Persons. The author sets out rules concerning natural and legal persons—their beginning, their end, and the grounds for incapacity—which have their origin in the Corpus Juris. It may be noted incidentally that the author criticises the reasoning behind the decision in *Drummond's Judicial Factor* v. *H. M. Advocate* (1944 S.L.T. 399) as pushing logic to absurd results (p. 112).

The last part of the book is devoted to Family Law. The author notes that modern family law derives less than most branches from Roman models, for the central institution, marriage, is based on Christian ideas which had not fully permeated the Corpus Juris. But he successfully disentangles what Roman elements have survived in the law of marriage, matrimonial property and *patria potestas*. The reader is left with a feeling of sorrow that the author was not spared to apply his skill to a subject like the law of Obligations, where the Roman elements are so much more pronounced.

It may be proper to conclude this account of the contents of the book with a warning of what it is *not*. It in no sense purports to be a history of the particular rules and institutions which it describes. The author discusses the relevant rules in their Roman setting and then turns to their position in the modern Codes. He refers primarily to the French Code Civil and the German BGB, although the special features of the Swiss Code are often cited. (The Italian Code of 1943 might perhaps have received more attention.) Where the Roman rule has been received with no substantial modification as, *e.g.*, in the legal position of *impuberes*, it would clearly have been otiose to detail the intervening stages, but where, as is more frequently the case, the Roman rule survives but has undergone much modification, there is little attempt to trace the various stages through the Glossators, Commentators, Humanists, etc. So stimulating is the author's discussion that the reader is continually asking " But how and why and when did this modification take place?" To such questions the book usually makes a mere allusion, although there are one or two welcome exceptions, particularly in the first half of the book. Indeed the emphasis in the first half seems to be more historical where that in the second half is more dogmatic. It is perhaps characteristic that the modern author most frequently quoted in the first half is Savigny, the leader of the Historical School, whereas in the second half his place is taken by Windscheid, the Prince of dogmatic Pandectists. This can hardly be taken as a criticism of the book, as the author himself disavows the intention of explaining the transformations in detail.

Scottish readers will be disappointed that the book virtually ignores Scots law, but it is none the less a work of great interest to Scots lawyers, and they will derive from it both profit and pleasure, for the author's reputation for liveliness and readability is fully maintained. The publication of a book of such technicality from the author's manuscript (there appear to be over 500 citations from the Corpus Juris alone) is an achievement of which the Oxford University Press can be proud. The index which they have provided is particularly well compiled. Altogether, the book is a worthy memorial to a great Romanist.

PETER STEIN.

Tax Planning and the Family Company with Precedents. By David R. Stanford, Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd. Price £2 10s. net.

In these days of high taxation and complicated and penal provisions, it may seem to some surprising that the " Family Company " (defined by Mr. Stanford as one controlled by a small number of persons) still survives in any considerable number. Anyone who has to advise such a company must know how difficult it often is to avoid incurring, quite inadvertently, a large liability to income tax, surtax, profits tax or death duties which might have been avoided had a transaction taken a different form. How often do the directors of other companies do something in order to save some income tax or surtax only to find that the result is a very greatly increased liability to profits tax, or vice versa. Alternatively, they may omit to do something which might, if done, have reduced the taxation liability of the company or its members considerably.

This does not pretend to be a comprehensive textbook on income tax, profits tax and death duties. A book to do that would require to be many times the size of this one. It does, however, set out to explain items of particular importance to the members of the family company. It starts with a chapter on control, which explains the definitions of " control " for surtax and for estate duty; the effect of abandonment of control; the definition of " Director control " and the effect of it and its abandonment. There follows a chapter on estate duty where the deceased had not individual control, and a chapter on the effect of such control and its surrender on estate duty, and then a chapter on the rarely used but penal provisions of section 46 of the Finance Act, 1940.

There are chapters on surtax directions, profits tax, groups of companies, and pension provisions and finally a chapter on benefits received from a company either via shareholding or via employment.

Throughout a distinction is drawn between sections of legislation which have been interpreted by the courts, the meaning of which is " clearly present law " and what is " reasoned opinion as to that law " in the all too numerous places where no guidance has been given by the courts on the interpretation of legislation.

The book is self-contained and includes a number of precedents. These are, of course, in English form, but when the subject-matter is taxation or company law this is rarely a difficulty for the Scots lawyer. Anyone who is in a position of advising clients in the sphere covered by this book will readily appreciate the alterations necessary, particularly in the case of trusts and indorsements on insurance policies, to conform to Scots law and practice.

Though surtax, profits tax and death duties are the most important matters dealt with in this book, stamp duty is not neglected, and the four pages beginning on page 268 dealing with " Reconstruction or amalgamation " is the clearest exposition of the provisions of section 55 of the Finance Act, 1927 (as amended), combined with the profits and income tax effects of such operations that the writer has yet seen.

The book can be recommended to all concerned in this branch of the law. Whether the user is a student or an expert he is bound to find this book of considerable value, even if only as a reminder of points and difficulties to be considered in each case. No one dealing with this subject only occasionally can afford not to consult this book or take independent advice.

T. M. W.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

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Carver Carriage of Goods by Sea. Tenth Edition. By Raoul P. Colinvaux, Barrister-at-Law. 1957. London: Stevens & Sons, Ltd. Price £6 10s. net.

The Sale of Goods. By P. S. Atiyah, B.A., B.C.L.(OXON), Barrister-at-Law. 1957. London: Sir Isaac Pitman & Sons, Ltd. Price 25s. net.

JURIDICAL REVIEW

PLEASURE GARDENS

PLEASURE gardens attached—to use a neutral word—to terraces, squares and crescents were a well-known feature of urban development in the late eighteenth and in the nineteenth centuries both in England and in Scotland. These terraces, squares and crescents were frequently laid out on a plan that provided for a garden which was to be available for the joint or common use of the owners of the houses and their families. The scheme is a familiar one. Many examples in Edinburgh, Glasgow and London come readily to mind. There is a row of houses usually uniform, facing inwards on a garden in a square or crescent or terrace intended to form (and doing so in fact) an essential feature of the scheme appurtenant to all and each of the houses which are to enjoy in common with the others this garden. And these schemes were not confined to these three cities. *Quid juris?* In Scotland under Scots law the right in respect of these gardens which was given to the proprietors of the houses was and is either (*a*) that of common interest or (*b*) that of common property combined with common interest. There is a right of common interest apart from the question of ownership but nevertheless that common interest and right of common property may exist in the same person.[1] " Common interest " was " an expression which seems to have been almost on the lips of our lawyers at the beginning, but not actually uttered till near the end, of the eighteenth century." [2] This " common interest " had subsisted in Scotland for as long as there had been cities and towns in regard to such matters as flatted properties and rights in ancient paved courts. When towards the end of the eighteenth century there came to be a great deal of building in Edinburgh, conveyancers were sometimes at a loss in endeavouring to secure the rights of their clients to know to what category to refer this right in gardens. In some cases it was thought it came under common property, in others servitude, and again it was sometimes referred to the category of real burden. "I think the attempt to class such rights as servitudes has not been very successful because in the case of a servitude each person who is interested in the subject that they are to enjoy in common has a right dependent upon and limited by his own titles, and the rights of different owners in the subject that they are to possess in common might be different, whereas the peculiarity of the description of right which we call common interest is that the rights of all the persons who have it are equal.[3] Then I say nothing about real burdens, because that is rather a name descriptive of an encumbrance than of a condition qualifying the right of the legal owner of the estate. It was due to Mr. Bell that this sort of right came to be recognised as a thing *sui generis* to which the name 'common interest' was given; a right which, though not falling under any of the categories I have referred to, was a restriction upon the use of property which the law would recognise."[4] A "common interest" was defined by Bell (*Principles*)[5] thus, "a species of right differing from common property takes place among the owners of subjects possessed in separate portions but still united by their common interest. It is recognised in law as 'common interest.' It accompanies and is incorporated with the several rights of individual property." To this definition there falls to be added the addition made by Sheriff Guthrie, the learned editor of Bell's work, and approved by the court in *Grant*,[6] that " where neighbouring owners have a common interest in anything, their rights are ruled by the titles constituting their rights as interpreted by law or equity. Anyone of the community is entitled to maintain the existing state of possession against the others."

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[1] Rankine, *infra*, 655.

[2] Rankine, *Landownership*, 4th ed., 660.

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[3] See Bell § 1086 referring to lands in Edinburgh that common interest differs from servitude in respect that each person concerned there is bound by the common interest to maintain his own wall, which in mere servitude he would not be obliged to do.

[4] *Grant* v. *Geo. Heriot's Trust* (1905) 8 F. 647 *per* Lord McLaren at 664–665.

[5] § 1086. See Gloag and Henderson, 6th ed., 520–521.

Whether the proprietor's right is only one of common interest or of common property and common interest naturally depends on the terms of the title-deeds. In effect there is no difference in the two cases.[7] The Lord President said " In the familiar instance which has often come before the courts, that of laying out of squares, the property remains in the superior, and yet each of the feuars who have no property in the square has a common interest in the square ; and I do not doubt that the same result follows in law where the only difference you make is that the property of the square instead of being in the superior is held in common property by the feuars themselves, because held in common property by the feuars themselves as here it is a perfectly separate property. It is a property in which each individual owner is only partially interested because he is only a *pro indiviso* proprietor ; and therefore I see no difficulty in law in holding that the result of these titles was not only to create a right of common property in the square and the street, but also to create a right of common interest in the individual houses in the square and the street." So in *Governors of George Watson's Hospital* v. *Cormack*,[8] relating to George Square, Edinburgh, the titles gave to each proprietor a right and interest in the centrical area in the middle of the square in common with the other proprietors and each proprietor was taken bound to enclose, lay out and keep that area in good order and in an ornate manner. The area, however, remained the superior's property. The Lord President said[8a] " The right conferred to the centrical area is not a right of property but what is known in law as a common interest, and all the proprietors in the square have it jointly." On the other hand, in *Grant* (*supra*) relating to Brown Square, Edinburgh, the right given was both a right of common property and one of common interest. These are the two leading cases, but it appears in *Bell* v. *Lady Ashburton*,[9] that the right of the proprietors in respect of Abercromby Place, Edinburgh, was one of common property as well as interest; and in *Parlane* v. *Duncan*,[10] that there was a similar state of affairs at Clifton Street, Glasgow.

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[6] *Per* L.P. at 659.

[7] See *per* L.P. at 659 and Lord McLaren at 664 in *Grant*.

[8] (1884) 11 R. 320.

[8a] At 325.

In respect of this common interest each owner can insist on the treatment of the gardens in a certain way and each is personally liable for a share of the cost of its being so dealt with. Sometimes where the right of property is not in the hands of the owners of the houses they are obliged to pay the garden owner a certain sum or proportion. Sometimes the titles contain provisions as to the use and management, sometimes they don't and the parties are then left to manage the matter themselves. In *Cormack* (*supra*) where the titles did not have any such regulations, it was held that past possession and administration—the regulations drawn up by the proprietors—must be taken as the measure of the rights, and thus no claim could be enforced in regard to pupils of a school, which now occupied one of the houses formerly in private individual ownership, beyond what the proprietors had in the past arranged and agreed upon. In *Keith* v. *Twentieth Century Club*,[11] it was held that members of a club did not come within the term " tenants." In a recent Sheriff Court case—*Forster* v. *Fryer*[12]—in relation to Athole Gardens, Glasgow, the house owners were given *pro indiviso* shares of the gardens which were to be occupied solely as ornamental pleasure grounds in connection with each steading and the other steadings, and they were to form a board of management. By a minute of agreement a scheme of administration had been prepared and had been acted on for over forty years before the case; and it was held that this scheme was binding on a singular successor, who was thus liable for a share of the cost of upkeep under it. The right of the garden owner to recover the expense of maintaining the gardens may not arise till the whole area has been completed. Thus, in *McMillan* v. *Duncan*,[13] it was held that, in terms of the deed there, the owner was not entitled to recover from any feuars any part of the expense of maintaining the ornamental open spaces till all the spaces had been completed.

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[9] (1826) 13 S. 920.
[10] (1881) 18 S.L.R. 561.
[11] (1904) 90 L.T. 775.
[12] (1944) 60 Sh.Ct.Rep. 39.

In this more or less settled state of affairs it must therefore have come as somewhat of a surprise to the Scots lawyer to find that in England the question of the validity of such grants where there was no question of common ownership or tenancy in common [14] by the surrounding proprietors (and one emphasises "grant" as contrasted with use)—whether the owners of the houses or plots had any legal or enforceable rights to enjoy the amenities of such a square—had to be considered and determined. Had the issue arisen between the original parties there would have been of course at least effective rights by way of licence or contract. But the issue arose between the singular successors of the original parties and what may be binding between A and B may not be so between their respective successors. If, however, a legal [15] easement (that is one in perpetuity or for a term of years) is one validly created and annexed to a tenement, it transmits in reference to both the dominant and the servient tenement on a transmission of either tenement.[16] The successive owners of the dominant tenement can sue the succeeding owners of the servient tenement without regard to any question as to the burden of covenants running with the land. " At least since the last quarter of the seventeenth century a charming feature of many English towns has been private squares used and enjoyed exclusively by the owners of the surrounding houses, their families and members of their households," [17] yet " although the existence of gardens surrounded by houses, the owners or occupiers of which enjoy in practice the amenities of the gardens is a well-known feature of town development throughout the country, no other case appears to have come before the courts in which the validity of the rights in fact enjoyed in the gardens has ever been tested " (*per* Sir Raymond Evershed M.R. in *Re Ellenborough Park, re Davies (decd.), Powell and Others* v. *Maddison and Another*).[18] The comparative lawyer will note with interest that the question is treated in English law as one of easement or servitude. The decision is important to the Scots lawyer who has clients holding property in England who may be affected by the result of the case. It is also of much interest in that it involved a reference to two important topics—the history of the law of easements in England ; and the meaning and scope of the *jus spatiandi* of the Roman law.

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[13] (1936) 54 Sh.Ct.Rep. 3.

[14] A tenancy in common of a legal estate in land is impossible since 1925—Law of Property Act, 1925, s. 36 (1)—but as easements are classed as legal interests—Law of Property Act, 1925, s. 1 (2)—there is nothing in s. 36 (1) which will prevent ownership in common of an easement as distinct from ownership in common of the dominant tenement or the surrounding properties, which is no longer permitted. Halsbury, 2nd ed., xxvii, 752, *et seq*.

[15] In the case of an "equitable" easement there must be notice or registration as a land charge. Gale, *Easements*, 12th ed., 66 *et seq*., Halsbury, 3rd ed., xii, 522, 527. As to what is an equitable easement, see Gale, 66–68, Halsbury, xii, 527. It was not defined before 1926 and even since then, though it has been defined, it is not clear what amounts to such an easement.

First of all, what were the facts in this latest English case, " the substantial question " in which was, in the words of the Court of Appeal, " one of considerable interest and importance." Land surrounding Ellenborough Park, which was part of an estate at Weston-super-Mare, had been sold in plots for building purposes in 1855 and later years under conveyances which generally conveyed these plots in fee simple with certain easements for the use of roads, paths, drains on the estate "and also the full enjoyment . . . at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land . . . in the centre of the square called Ellenborough Park . . . subject to the payment of a fair and just proportion of the costs, charges and expenses of keeping in good order and condition the said pleasure ground." The sellers undertook for themselves and their heirs executors and assigns to keep the ground as an ornamental pleasure ground and not to erect, or permit the erection of, any building on it and that it should at all times remain as an ornamental garden or pleasure ground. The purchaser undertook to build on his plot and to pay a fair proportion of the expenses of keeping the pleasure ground in good order and condition and well stocked with plants and shrubs. When most of the plots fronting the park had been sold—in 1879—the park and the other parts of the estate were sold to A (who on his death in 1880 was succeeded by his trustees) subject, *inter alia*, to the rights still subsisting in relation to the pleasure ground of all to whom the use and enjoyment of it had been given. The gardens were surrounded by a road on three sides, and by the sea on the fourth. Most of the plots adjoined the road and fronted on the pleasure ground but there were about nine or ten which did not adjoin but were separated from the road by the plots next to the road. Their right to share the privilege did not affect the general plan. When the question arose—and it arose when the matter of the division of the compensation payable at the cessation of the war-time requisitioning of the park was the subject of controversy—all the proprietors were not, unnaturally, successors of the original owners.

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[16] Gale, 15, 70, Halsbury, 3rd ed., xii, 521–522. See, in regard to the dominant tenement, Law of Property Act, 1925, s. 62. So with a servitude in Scots law: Stair, II, vii, 1.

[17] 221 L.T. 34.

[18] [1955] 3 All E.R. 667.

Now, it will be noticed that this was a case where the ownership of the square was not transferred. (A common modern English scheme is, it is understood, to transfer the square to a company or to trustees in trust for the house owners.)[19] The decision was that the original owners and their successors had been given rights to the communal enjoyment of the park as a garden like a right of way or a right of drainage and that these rights were valid easements in law. The rights were held to be valid easements in respect that they fulfilled each of the four tests or features of an easement.[20] These four tests (which may be compared with Scots law as laid down by Sir John Rankine) are (1) there must be a dominant and a servient tenement.[21] There was such in this case, as between the house owners and the gardens owners; (2) the easement must accommodate the dominant tenement.[22] Here it related to the normal enjoyment of the houses as residences, and the plots which did not front on the square had sufficient connection with the dominant tenement[23]; (3) the owners of the dominant and the servient tenements must be (which in fact they were) different persons or at least persons holding by different rights[24]; (4) the rights must be (as they were in this case) capable of being the subject of a grant of easement that is, their nature must be well defined and understood[25] and they must be a beneficial attribute of residence, having utility or benefit to it.[26] The importance of the decision, it has been observed,[27] is the acceptance of Dr. Cheshire's view that a right having these four qualities is *ipso facto* an easement. In the fourth requirement there is involved the further requirement that the right must not involve too drastic an invasion of the servient owner's rights.[28]

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[19] In this connection, reference may be made to *Re Buchanan Wollaston's Conveyance*, *Curtis* v. *Buchanan Wollaston* [1939] Ch. 738, where owners of neighbouring houses had bought adjacent land for amenity purposes and had executed a deed conveying the land to them as joint tenants with the result that it was held on a trust for sale laying down how that land was to be administered, including the consents that were to be necessary on a sale, and it was held that the statutory trust for sale did not override the terms of the parties' contract, for the statutory trust was obviously intended to be exercised subject to the power of the court to enforce it, and Parliament must have known that amongst the principles upon which the court acts was whether it was at the time right and proper to act and in that regard to look at the parties' contract: only in exceptional circumstances would an order for sale be made in face of such a contract as there was there. And a clause stating that references to a party included his heirs, assigns, etc., showed that the provisions as to consents were not limited to the joint lives of the parties.

[20] See Cheshire, *Modern Law of Real Property*, 7th ed., 456–459; Megarry, *Manual of Real Property Law*, 421–424. See Gale, 10 *et seq.*

[21] Rankine, 421.

[22] Rankine, 421; Gale, 20.

[23] See Ersk., Inst., II. ix. 33, citing the Roman law, Dig. VIII. ii. 37, 39, iii. 7. See Gale, 20.

[24] Rankine, 421, 443.

[25] Rankine, 418.

[26] Gale, 20.

The issue was this—were the rights granted too vague or wide, and were they mere (and no more than) rights of recreation? On the former issue the terms of the deed were considered to show clearly that the right was intended to be annexed to the land and while the enjoyment was not exclusive it was not to extend to premises which were not part of or at least closely attached to or connected with the square. And if the construction of the deed did not show that the rights were examples of the general grant of easements it at least made it clear that they were, so far as they properly could be, analogous to rights of way. There being an implied negative undertaking by the garden owners not to use the gardens otherwise than as a garden,[29] the benefit and burden of it ran with the land.

What then under the deed was the nature and extent of the right given by the deed? It could not be construed, even allowing for the words " full enjoyment " and the absence of express limits on its use or of any indication of the method of enjoyment, as a *jus spatiandi* in the strict (that is, the fullest) sense, as one to wander on every part of the park, enjoy its amenities and produce unrestricted. There was a limit to it. In the court's view the enjoyment intended was of an ornamental garden in its physical state as such—the right (*a*) to walk on or over the paths and, subject to restrictions in the ordinary course in the interest of grass, the lawns; (*b*) to rest on seats or other places provided; and (*c*) to use subject to any regulations any parts set apart for recreation for that purpose. This use was a common and clearly understood conception, and was analogous to the right of members of the public in a public park when open. It did not obviously entitle one to trample all over the place, pluck flowers or bushes or interfere in the upkeep of the park.[30]

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[27] 106 L.J. 119.

[28] See *e.g.*, *Copeland* v. *Greenhalf* [1952] Ch. 488, where the right claimed was held to be of too wide and ill-defined a nature and to amount to a virtual joint user of the land.

[29] This could have existed as a restrictive covenant without any easement being necessary.

There remained the other vital feature (the second of the tests): did this right accommodate and serve the dominant tenement? No doubt it enhanced the value but it must also be shown to be connected with the actual enjoyment of the tenement,[31] and that depended on the nature of the tenement and of the right given. As to the nature of the tenement it was clearly to be a residential estate or property. A right to attend Lord's Cricket Ground free would undoubtedly, at any rate to a Test Match enthusiast, enhance the value of a house but it could not be a valid easement for it would be quite independent of the use of the house *as a house.* An analogous situation was when part of a house was sold, and a right, appurtenant to it, was given to use the garden in common with the seller and his assignees. The gardens in *Ellenborough* were simply to be a communal or collective garden for the benefit of all the neighbouring houses adjoining it or close to it, the indirect connection of a few houses being of no account, for physical contiguity was not an absolute essential.[32] The flower beds and lawns would give the amenities of an ordinary garden. Nor was the right, in its nature, too wide and vague. It was well defined and utterly different from a *jus spatiandi* (an indefinite and unregulated privilege, which could be a personal licence) which involved a wandering at will over all and every part of another's park or land. Moreover the owner was not excluded here and the granting of rights to a few to use its amenities was not repugnant to ownership.

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[30] See Dig. VIII. i. 8.

[31] Gale, 19; *Todrick, infra*; *Copeland, supra*—it will be so connected even though it is really for the benefit of a business carried on in the tenement.

[32] *Todrick* (*infra*) *per* Romer L.J. at 580.

The court pointed out that it had been said in Theobald, *Law of Land*, 263—but they also noted that the statement did not appear in Gale's work—that an easement must not be for mere recreation and amusement but must be of utility and benefit. If that rule was sound, the garden right fulfilled the necessary requirement: no doubt a garden was " the purest of pleasure " but it was a right with, in the ordinary sense, benefit or utility. Here its use for exercise and rest and ordinary domestic purposes was beneficial and of utility to the houses. The court thought that the statement in Theobald fell to be read in the light of the case of *Mounsey* v. *Ismay*[33] there cited which related to a right to conduct horse racing.

The court found authority in favour of the recognition of the right as an easement in *Duncan* v. *Louch*,[34] concerning a right of way from A to B over or across a particular Walk in London. In argument it was there said that the right contended for there was " like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the owners and tenants of the houses of walking about the garden, on condition of keeping it in order." Not only did Lord Denman C.J.[35] hold that this was a right recognised by law, but indeed the reasoning of the decision and the language used by the court involved that that right was a valid easement. Had the four judges thought there was any question of a right not recognised as an easement (and the argument raised the precise point) the claim would have failed.[36] In *Keith* (*supra*), Buckley J. had not needed to decide the point as he had regarded himself as bound by the basis of the questions put to him, which had treated the right as valid.

The court, however, were faced with the fact that in two cases—*International Tea Stores* v. *Hobbs*[37] and *Att.-Gen.*

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[33] (1865) 3 H. & C. 486.

[34] (1845) 6 Q.B. 904. See 71 L.Q.R. 325.

[35] At 913.

[36] [1955] 2 All E.R. 47.

[37] [1903] 2 Ch. at 172.

v. *Antrobus*[38]—Farwell J. had indicated that a right that was properly *jus spatiandi* could not be an easement under English as under Roman law, and that the right (even if expressly given) of a man to use, as appurtenant to his property, the gardens of another for pleasure or amenity was one not known to the law. See Gale,[38a] where, however, in a note it is said that it is believed, as in the case of the London squares, that leases often have provisions creating such a right to be enjoyed by the inhabitants of a particular messuage and "the validity of such a right seems clear." This could of course be on a contractual basis. Probably the writer of the note had *Duncan* in mind. Danckwerts J. had, one notes, observed[39] that cases of squares in London, etc., might in many cases involve different conditions, involving the terms of leases and the law of landlord and tenant or even the terms of Acts, special or general—Recreation Grounds Act, 1859, or the Town Gardens Protection Act, 1863. But for Farwell J.'s dicta the point probably would not have been argued. The court, however, said that the statement in the first case was purely *obiter*, and that in the second was in a case relating to public rights at Stonehenge—and clearly the public could not by user acquire a *jus spatiandi* as an easement for there would be no dominant tenement—a very different situation. While Farwell J. was a judge of great learning, all of whose utterances deservedly received very great respect, the court said it was not clear what was the reason for his view, *e.g.*, was it that it was unknown to Roman law, or that it was repugnant to ownership, or a mere recreation right, or too vague and uncertain. Whatever it was, it could not stand against *Duncan's* case, to which Farwell J.'s attention had not been drawn.

So the Court of Appeal, as Danckwerts J. had done, recognised the right as valid. No doubt in a sense, the court said, there was an element of *jus spatiandi* in the right they were recognising in respect of a privilege of wandering at will round at least most of the garden but it was doubtful if even that could be said to be *jus spatiandi*, as wandering at large was of the essence and the main purpose of that *jus*, whereas here wandering was only *one* method of enjoying the right. Were the court right in this view of the *jus*? Farwell J.'s rejection of the *jus spatiandi* may have been based on the Roman law rejection of it but, the court said, this garden right, being a part of modern urban development unknown to the Romans, did not necessarily fall within the *jus*, and in any event, the question was one of English law. Now, in Roman law a real servitude could not consist in a right of mere amenity or personal enjoyment.[40] In a praedial servitude the burden had to relate to a benefit *attached to another property*. Roman law did not recognise what in English law is " profit in gross "; thus, says Lee,[41] translating a passage in the *Digest*,[42] " a servitude cannot be created to the effect that a man shall be at liberty to pluck fruit or to walk about or to picnic on another man's ground." So the mere personal pleasure and enjoyment of A in B's lands could not be a servitude. And Voet [43] says " *Caeterum, uti ultra praedii dominantis utilitatem servitus regulariter non constituitur, ita ex adverso nec talis recte conceditur, quae neque de praesenti neque de futuro ullam praedio dominanti adferret utilitatem. Cui consequens est, solius amoenitatis gratia reales non posse servitutes indulgeri; praesertim, cum constet, amoenitatem non ad res, sed personas referri. Unde et Paulus, cum in servitute ut pomum decerpere, vel ut spatiari, vel ut coenare in alieno liceat, nullam inveniret utilitatem, quae tribui praedio posset, sed solam personae voluptatem, merito in* l. 8 *ff. de servit., talem servitutem imponi posse negavit.*" And Vinnius says,[44] after quoting Paulus, " *nimirum quia hoc jus praedii nostri causa non constituitur nec praedii nostri*

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[38] [1905] 2 Ch. at 198.

[38a] p. 23.

[39] At p. 49.

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[40] Lee, *Roman Dutch Law*, 180.

[41] *Elements of Roman Law*, 3rd ed., 156.

[42] VIII. i. 8 pr.

[43] VIII. iv. 15.

[44] II. iii. 3.

causam meliorem facit." Thus, as Gale,[45] quoting the *Digest* (*supra*), puts it "By the civil law a servitude must be productive of benefit to or advantage to a dominant tenement. Mere restriction on the rights of the servient owner is invalid if unaccompanied by benefit to the dominant owner or if the benefit is merely personal to him." In this latest case the court construed the benefit as one that was and could be attached to the dominant tenement and not as a mere amenity or personal pleasure. Had Paulus thought of Ellenborough Park can it be doubted that he must have held that the right there had been validly constituted?

What has Scots law to say on the issue of *jus spatiandi*? In Scots law a *jus spatiandi* has been treated as a right of strolling at large and it has been laid down[46] that while there is no such thing as a servitude of strolling where there is no question of benefit to a dominant tenement, an express, though not a prescriptive or customary, *jus spatiandi* over private property may be established. This is, however, in relation to the public generally. It may be questioned if the passage in Rankine is not too strongly stated for the Lord Chancellor in *Dyce* was speaking purely *obiter* in regard to express grant. He said[46a] that he was not prepared to say that if the proper forms were observed such a right might not be granted: he was referring to a case where there had been an express reservation in favour of a burgh—*Magistrates of Dundee* v. *Hunter*,[47] and another parallel illustration is *Cleghorn* (*infra*). In *Dyce* in the Court of Session, it was said[48] "a right to walk over the property of another in all directions and in any way a party chose for the purpose of amusement and of idling away time is a servitude not known to Scots law." That is the Roman law. It is treating it as a case of a right not connected with any property. "A *servitus spatiandi* over open ground, which has in some manner been devoted to public use, is also intelligible and known to the law; but such a right as that here claimed over private enclosed grounds, not made for the public, but for private parties, and having no written title connected with the grounds, for merely walking over them, and resting thereon according to their pleasure, is a thing of which, I believe, there has hitherto been no example."[49] As the Lord Chancellor said[50] "no man could be considered to have a right of property worth holding in (such) a soil." All this, however, was in relation to the general public. And again, of course, the use of land held for a community is quite another thing.[51] The cases of *Dyce* v. *Hay*[52] and *Cleghorn* v. *Dempster*[53] were cited in the latest English case but the court said the former related to a claim by a large and ill-defined number of persons to a *jus spatiandi* from immemorial use over another's property. As Danckwerts J. said[54] the claim there was "plainly in the nature of a public right, and has little to do with an easement appurtenant to a dominant tenement." *Cleghorn's* case was also different for it related to a claim by certain inhabitants of St. Andrews and others to have a right to golf against a tenant whose rabbits were said to be interfering with that noble game. The links had been feued out by the town under reservation of the right of the inhabitants to golf and the feuar had let the links to a tenant for use as a rabbit warren. The rabbits, as is their wont, rapidly increased and soon threatened to ruin the course. Lord Eldon had said that the case excited great warmth of feeling, "which indeed may" said the court "sufficiently appear from the allegation that some of the rabbits on the course were English rabbits!" Clearly the courts were not thinking of express garden grants or rights.

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[45] p. 19.

[46] Rankine, 332, 352, 354, 421. *Dyce, infra.*

[46a] At 312.

[47] (1843) 6 D. 12; (1858) 20 D. 1067.

[48] (1849) 11 D. at 1276–1277.

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[49] *Per* Lord Moncreiff at 1281. See also *Mackintosh* v. *Moir* (1871) 9 M. at 578 *per* Lord Ardmillan, at 580 *per* Lord Gifford.

[50] 1 Macq. at 300.

[51] Rankine, 354, 358.

[52] (1852) 1 Macq. 305.

[53] (1813) 2 Dow. 40.

[54] [1955] 2 All E.R. 44.

In his *Lectures* Baron Hume says[55] that there was then no judgment acknowledging a servitude *spatiandi* " and indeed the general precepts of our practice seem rather to be against such a privilege. It seems rather to be of the nature of a personal privilege (which our law does not recognise) and for the gratification of an individual—than a matter of substantial benefit to a tenement so as to bring it under the maxim *praedium servit praedio*." He is thinking of the Roman law *jus spatiandi* and its rejection there as a matter of pure *personal* enjoyment. All this is very different from the garden rights we are considering.

In the course of their judgment the court considered the origin and historical development of the law of easements in English law. (Distinguish of course an easement from a profit *à prendre*, the right to take something off land of another or common rights.)[56] The term and the right had been known to the medieval common law, but Roman law had had very little influence on its development at that time. The law too was then clearly of a rudimentary character. In the sixteenth and seventeenth centuries some of Bracton's borrowings from Roman law had been copied by Coke and appeared in some of the decisions but the definition in two works of the late sixteenth century showed how different the conception was as compared with the twentieth century. Those Roman law rules which Bracton had adopted had, however, with some modifications been absorbed in the rules of the assize of nuisance and when that assize was replaced by the action on the case a freer development of the law had become possible. While the law as so developed was sufficient for the needs of the eighteenth century, it was none the less the case that Blackstone's statement of it was inadequate. There was indeed little authority in many parts of the subject till the beginning of the nineteenth century, see *e.g.*, Gale, 1st ed., in 1839. The arrival of the Industrial Revolution and the beginning of urban development however gave to the law an increasing importance and rendered necessary an expansion and elaboration of the principles and rules. This development was carried out through the Roman law rules of Bracton, the old rules under the assize of nuisance and the action on the case, and through the Roman rules in the *Digest* which Gale had used to illustrate and supplement the existing rules of the law. Gale's book thus became the starting point of the law of the late nineteenth and twentieth centuries and the rules he drew from Roman law, if at least not different from the principles of the English common law, were frequently applied so that Roman law had played a part in the construction of the modern law of easements. Thus, the leading principles of the present law in some cases came from the early period but in general they are derived from all periods of the history of the common law and through Bracton Roman law has had much influence.[57] The English law of easements is thus " very largely derived from the Roman law of servitudes." [58] In view of the court's attitude the effect of this last case may be, it has been said, to reduce the importance of Roman law in this sphere in English law.[59]

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[55] Vol. III, p. 269, Stair Society, Vol. XVII.

[56] Halsbury, 3rd ed., xii, 620–621.

The Court of Appeal by their decision determined that a new easement did not need to fall into an established category but had merely to conform to certain general characteristics. In 1833 it had been said in *Keppel* v. *Bailey*,[60] that new kinds of easements could not be made and that the list of easements was closed, but it was pointed out in *Dyce* (*supra*) that Lord Brougham in *Keppel* had only said it was new ones created " at the fancy and caprice of the owner." And in *Dyce* it was held that new ones could be made. The Lord Chancellor said [61] " there is no rule in the Law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles" . . . "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles." But recreation and walking were scarcely, he thought, novelties. Or as Lord Shaw said[62] "The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement (in that case) is claimed inconsistent in principle with a right of easement as such." Thus, in England the category is not closed, and must expand with the changing needs of society,[63] though it is no doubt difficult in practice to include new rights.[64] So too in Scotland the list is not closed.[65]

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[57] Holdsworth, *History of English Law*, vii, 323–324, 333; iii, 129; *Historical Introduction to the Land Law* (1927), 265.

[58] Radcliffe, *Real Property Law*, 2nd ed., 146; Gale, Preface to 1st ed., p. vii, 12th ed.

[59] 106 L.J. 119.

[60] 2 My. & K. 517.

[61] 1 Macq. at 312.

Though in Bracton's and even in Littleton's time it was not settled that there could not be an easement in gross, and the position was uncertain even in 1839 when Gale wrote, it has since the latter half of the nineteenth century become the rule that the easement must be appurtenant to a tenement. The law had prior to that time remained undecided because of the attitude of writers and of the courts and the failure to distingush an easement proper from customary rights in the nature of easements. The law was finally settled by Lord Cairns in 1868 in *Rangeley* v. *Midland Ry.*[66] And the modern rule, it is suggested, arose through the scope of the old assize of nuisance being limited to freeholders and this rule surviving to become a fixed rule when the old remedy had become obsolete.[67]

What are the roots of the Scots law of servitudes? In its main principles it is identical with those of the *Jus*

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[62] *Att.-Gen. of Southern Nigeria* v. *John Holt & Co. (Liverpool)* [1915] A.C. at 617.

[63] Halsbury, 3rd ed., Vol. xii, p. 533; Gale, 76, 23–24, 30; Cheshire, *Modern Real Property*, 7th ed., 462.

[64] Gale, 76.

[65] Rankine, 418–419. *Cf.* Hume, *Lectures*, III, 270.

[66] L.R. 3 Ch.App. 310–311. Gale, 13–14.

[67] Holdsworth, *History*, vii, 324–326, iii, 129–130.

Civile. " It is obvious " says Mackintosh, *Roman Law in Modern Practice*[68] " that the English law of Easements and the nearly corresponding institution of Servitudes in Scots law were formulated with constant assistance from the Roman law. Many of the leading maxims and much of the terminology are common to all three systems." Or, as Lord Mackenzie put it,[69] " the Scottish law of servitudes is based substantially on the Roman system." See too Muirhead,[70] " Scots law has adopted the institution of servitudes and the rules of Roman law." This is, as has been pointed out,[71] specially true of our urban servitudes and is probably true there because of the coincidence of the rapidly increasing interest in the Roman law and of the growing urban development in the fifteenth and sixteenth centuries. This would increase in the next two centuries and when the great urban developments occurred, Roman law, if suitable, would be ready to hand. There are or were some rural servitudes that were not known to the Roman law and which were feudal in origin, such as thirlage and feal and divot, while pasturage represents a feature common to many systems. It is probably true to say that in general in the case of other rural servitudes it is not determinable now when and to what extent Roman law rules were adopted or how far existing customary Scots rules were modified by Roman rules.[72] Servitudes were, of course, known by the fifteenth and sixteenth centuries but there is not much in the books. They are very briefly noted in Balfour, Craig and Hope. Mr. McKechnie has recently drawn attention to the first brieve *de aqueductu* in 1433.[73] But the general development in Scotland as in England belongs to the later seventeenth and the eighteenth and nineteenth centuries, and hence their much greater prominence in the works of those times.

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[68] p. 141.

[69] *Studies in Roman Law*, p. 169.

[70] *Outlines of Roman Law*, 2nd ed., p. 101.

[71] Ross, *Servitudes in the Law of Scotland*, pp. 7, 58.

[72] Ross, *supra*, 7.

[73] *Judicial Process upon Brieves*, 1219–1532, David Murray Lecture, Glasgow University, 1956, p. 19.

The decision, which it was said would cause " a flutter among the footnotes "[74] has been hailed as " a most valuable one " in the absence of prior direct authority and as touching on " a matter which, despite the increasing tendency of local authorities to take over the management of private or restricted gardens and squares in urban areas, must affect a very large quantity of property in the country," as well as being " eminently sensible and practical."[75] There was thus recognised, says Halsbury,[76] for the first time a *jus spatiandi in solo alieno*. With all respect this seems a broad statement of the result, which it is thought must be treated as confined to and related to the facts.[77] At the same time it is submitted that if in any case the right *spatiandi* is attached to a tenement and is not a mere personal pleasure and is given by express grant it is a competent servitude or easement both in Scotland and in England, provided in Scotland it is not in conflict with the principle stated by Lord McLaren, which would exclude it from the category of a *common or joint* garden right. It has been questioned whether the principle of the decision would apply to a park of some hundred acres[78] but on principle there seems no reason why it should not. It has also been queried what is the best method in England of conferring this garden *jus spatiandi* in the case of flat or maisonette owners. As was pointed out in the Lords in *Dyce* (*supra*), some servitudes or easements are valid if established by express grant but would not be so if their constitution depended on prescriptive or customary usage. And it appears again from this latest English case, that in England this garden right would not be valid if its basis lay in prescriptive use—a possessory title to the freehold by twelve years' possession would be necessary.[79]

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[74] 18 M.L.R. 602.

[75] 100 S.J. 6. See also 71 L.Q.R. 325.

[76] 3rd ed., Vol. xii, p. 519 (*d*). And see too, pp. 533 (*t*), 569 (*i*) and 570 (*p*).

[77] See 100 S.J. 6.

[78] 221 L.T. 34.

[79] 106 L.J. 119.

In upholding the grant in this case the Court of Appeal expressed no opinion on the legal effect, if any, of an arrangement made in 1924 for regulating the future management and upkeep of the gardens and for meeting its costs. The original purchasers' deeds all contained a clause of covenant jointly to pay a fair proportion of the cost of maintenance. No question was raised as to that, the court observing that, the obligation being a condition of the enjoyment (the right was given subject to payment of the fair and just proportion of the costs of maintenance), each would be bound to contribute his due share of the reasonable cost. The liability to maintain, keep up or repair, or the liability to contribute to repairs may be under the grant attached to the enjoyment of the easement or imposed as a condition of the easement.[80] That was the case here. Put in another way, it could be said that the burden of the easement runs with it.[81] (More complicated issues may arise under a leasehold title.) If there is no provision for maintenance, there is no obligation of repair on the servient owner, the burden of repair lying on the dominant owner, who has, unless where artificial works are involved, a *right* but not an obligation to repair. This is so under Roman,[82] Scots[83] and English[84] law. In modern times, however, management is in England often placed in the hands of a body of trustees or a company to whom the garden has been conveyed, each house owner being responsible for his due share. There must of course be no increase of the burden of the easement on the servient tenement,[85] which must be used only for purposes within the reasonable contemplation of the parties having regard to the circumstances of the case, the situation of the land and the situation of the parties at the time of the grant.[86]

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[80] Gale, 433; Halsbury, 3rd ed., Vol. xii, pp. 521, 579–580; *Duncan* (*supra*) at 908, 912.

[81] Gale, 75.

[82] Dig. VIII. v. 6. 2. 8, XXXIX. iii. 2. 5.

[83] *Scottish Highland Distillery Co.* v. *Reid* (1877) 4 R. 1118 at 1122 *per* Lord Gifford, at 1126 *per* L.J.Cl.; Ferguson, *Roads*, 15, 24; Rankine, 416, whose treatment is not satisfactory, Ersk., II, ix, 8, 13.

[84] Gale, 421, 431.

[85] Ersk., II, ix, 4; Bell, § 988; Gale, 443; *Todrick* v. *Western National Omnibus Co.* [1934] 1 Ch. 190, 561.

The importance of easements in England has been reduced in modern times by the doctrine of restrictive covenants and by that of the non-derogation from grants. Thus, as has been pointed out [87] substantially the same effect can be obtained by a restrictive covenant without any attempt to create an easement. And such lawful interests as cannot be made easements are now fully protected by legislative measures, and equity.[88] Liability in respect of restrictive covenants under which there is a covenant to abstain from the use of land in a particular way may run with land where it is imposed for the benefit of that land.[89]

G. Campbell H. Paton.

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[86] [1934] 1 Ch. at 206–207. What this covers may be seen from *Todrick* (*supra*), with which may be contrasted *Kain* v. *Norfolk* [1949] Ch. 163 where there was a grant of a right of way "with or without horses, carts and agricultural machines and implements" and, these words being regarded as mere illustrations and not limitations, it was held that there was a right of carting by vehicles however propelled so that use by motor lorries was not an excessive use. See *Carstairs* v. *Spence*, 1924 S.C. 380; 1924 S.L.T. 300; *Smith* v. *Saxton*, 1928 S.N. 59.

[87] 105 L.T. 611.

[88] Stroud, *Easements* (1934), p. 9.

[89] Gale, 76–77. The writer desires to acknowledge the invaluable assistance kindly given to him by Prof. J. D. B. Mitchell, Edinburgh University, in regard to some of the intricacies of English law.

SHOWING THE HOLDING *

IT is a general rule of Scots law that no one can be compelled to produce any document belonging to him in order that an action, founded on that document, can be maintained against him. *Nemo tenetur edere instrumenta contra se.* Once an action is under way [1] it may be possible for one party to make the other produce his relevant documents, but when that happens the documents called for must be specified precisely. An interesting exception to both these rules is to be found in the old feudal action known as "showing the holding." By this action a superior (or at any rate one who had power to hold courts) could compel his vassals and tenants to produce in the superior's court all the charters of their lands, so that they could be examined. If a vassal failed to produce his charter, and could put forward no good excuse for his failure, he lost his land, and the same result followed if he was found to be holding the land in a way inconsistent with the terms of his charter. In this article the history of this peculiarly Scottish action will be traced from its first appearance in the thirteenth century to its replacement, in the early seventeenth, by the analogous and equally Scottish [2] action called "reduction-improbation."

Most of the feudalists agreed that the action pertained only to Scotland. Craig (though he admitted that some lawyers considered it to be part of the original feudal law) certainly took this view,[3] as did Alexander Bruce, in his little book *Principia Juris Feudalis.*[4] The law of England had no equivalent. The nearest approach in England was the *placitum de quo warranto*. This was an action initiated by a prerogative writ in the King's name directing his court to inquire by what warrant the defendant exercised a certain office or jurisdiction. The defendant had to prove, by producing written evidence if he had it, that he had sufficient warrant. Sometimes it was a subject, and not the King, who was plaintiff; and occasionally it was not tenure of an office but tenure of land that was to be investigated. It was a case of *quo warranto* about land and brought by a subject that most nearly resembled showing the holding, and several such examples are to be found in Bracton's *Notebook*.[5] There were, however, many differences from showing the holding—the chief one being that whereas a *quo warranto* had to be brought in the Royal Court, showing the holding, being a feudal action, lay in the court of the superior.

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* Most of the printed authorities cited in this article are referred to in the *Sources and Literature of Scots Law*, or have since been published by the Stair Society. The Manuscripts are mostly described in Vol. I of the *Acts of the Parliaments of Scotland*, pp. 181–205.

[1] In present practice after the record has been closed.

[2] See Hume's *Lectures* IV, p. 268, citing Stair, 4.20.8.

[3] Craig, 3.5.10.

[4] p. 263. *Cf.* Rosenthal (H.) *Tractatus et Synopsis Totius Juris Feudalis*, 1662, I, pp. 641 *et seq.*

It is in about 1259 [6] that the first case resembling showing the holding is found. The King addressed a brieve to the Sheriff and Bailies of Lanark requiring them to ascertain the tenure by which Adam Lawrence [7] held his land of the King and what service he owed the King therefor, and to find the extent of the lands that a sub-feuar held of him. Lawrence was to be compelled to produce the charter on which his claim to the land was based. The inquest was held at Lanark by eight barons and burgesses, who sent back to Chancery a retour containing the answers to the questions raised. They also reported that the charter of the land was in the possession of Lawrence's daughter; they had no doubt compelled her to produce it, for the brieve gave them special power to do so.[8]

There are some other cases of the thirteenth century which can truly be called "showing the holding" even though actual documents were neither produced nor expected. It must be remembered that at this time many vassals still held their lands without charters, and that they must themselves have been anxious to secure some sort of written evidence of their holdings. The decree of a competent court was just as good in this respect as a feudal charter. In the circumstances it is not surprising that cases were brought at the instance not of the superior but of the vassal himself. An inquest was held before the Sheriff of Elgin in 1261 to establish the exact rights of Robert Spink, the crossbowman, and of his wife Margaret, she having become heiress to a garden there. The findings of the inquest are interesting: the lands were found to be held by Margaret and her heirs, on condition that cabbages and garlic were supplied for the King's kitchen when he was in residence at Elgin Castle; and if the King had hawks or falcons with him Margaret was to receive one penny per day for feeding each hawk, and twopence for each falcon.[9] A significant fact in this case is that the bearer of the brieve—that is, the true pursuer—was Robert Spink himself. Ten years later the Abbot and Convent of Kelso found,[10] apparently without reference to any charter, that Sir Hugo Crawford and his wife were in lawful possession of the lands of Draffan, with power to hold courts of "bludwyth,"[11] "birthynsac"[12] and other small pleas, for certain services. With the passing of time the amount of land held without written title became less, and examples of showing the holding without reference to any charter became correspondingly rarer. However, a few such cases still arose in the fourteenth and fifteenth centuries. There are two brieves among the Coldingham Charters,[13] both dated 1368 and addressed to the Sheriff of Berwick, which seem to suggest actions of this kind; while the style of brieve for an "*inquisitio de aliquo*

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[5] The cases are collected by Houldsworth, *H.E.L.*, I, p. 181 n. 1. See also P. & M. II, p. 661; Woodbine's Bracton, IV, p. 168.

[6] The dating is conjectural.

[7] "de liberatione."

[8] A.P.S., I, p. 98; Cooper, *Cases*, No. 53; Bain, I, No. 2175.

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[9] A.P.S., I, pp. 99–100; Cooper, *Cases*, No. 57; *cf.* Cooper, *Cases*, Nos. 60, 70.

[10] *Kelso*, No. 474.

[11] Minor bloodshed.

[12] Theft of as much as a man could carry on his back.

[13] Raine, App. Coldingham, p. 19, Nos. lxxxvii, lxxxviii. These may have been issued as a result of the Act annexing Crown lands in 1367: A.P.S., I, pp. 501–502.

jure" in the Ayr and Bute MSS.[14] makes no mention of the necessity for showing a charter, the very purpose of the brieve being to find the nature of the right, if any, that the bearer had to certain lands. As late as 1459 in the Temple Court of the Preceptor of Torphicen the services due by the defender in respect of his land were established purely on verbal evidence.[15]

Of course, if written evidence was available it had to be produced. Thus in 1306 Michael Scott made a grant of land on the narrative that he was now satisfied, by the inspection of sealed instruments and by the findings of an inquest, that the grantee's ancestors had held the land previously—a fact that he had once disputed.[16]

It was only after the appearance of the *Quoniam Attachiamenta*[17] that actions of showing the holding (in their eventual form) became common.[18] Four rules are laid down in the *Quoniam Attachiamenta*, or Baron Laws, about this action, and it is interesting to see by charter evidence the extent to which these rules truly express the law as it was administered.

(1) A vassal summoned to show his charters should be cited not at his dwelling but on the land in question.[19] This was the rule in practice: Sir Thomas Hay and others were cited "at the chief plaz of the teneindri" in dispute, in 1385.[20]

(2) No free man is obliged to answer to his lord in his lord's court on any matter touching his freehold without the King's pleadable brieve.[21] This rule is taken from *Regiam Majestatem*,[22] and is an expression of English law. Unless

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[14] *Register of Brieves*, pp. 41, 58. *Cf.* cases of Alexander Tarvit (*Fife*, p. 5), George Strang and others (*ibid.*, p. 33) and Reginald Chyne (*Aberdeen*, I, p. 141).

[15] H.M.C.Rep. III, p. 408.

[16] *Buccleuch*, II, No. 374.

[17] Dated by Lord Cooper between 1286 and 1386. *Cf. Form and Maner of Baron Court*, c. 58.

[18] Though whether this is cause and effect is doubtful.

[19] c. 3.

[20] H.M.C.Rep., III, p. 410.

[21] c. 25. 1.

[22] R.M., III, 20.3; III, 25.1.

a very narrow construction be put on it—that no one with an *ex facie* valid title can be evicted without royal brieve—it cannot be said to express the law of Scotland, as many of the cases in this article show.

(3) "*Nec etiam sibi tenetur per summonitiones suas cartam suam ostendere nisi semel in vita sua*" [23]—nor is he obliged by reason of his superior's summons to produce his charter more often than once in his lifetime. The question is, to whom does the final "his" refer? The commoner translation is to say "during the vassal's lifetime," and the fact that the earlier manuscripts omit the words "*in vita sua*" [24] tends to support this construction. On the other hand according to Balfour's *Practicks* [25] it means the superior's lifetime; and in a case in 1532 a defender when showing his holding protested that he should not be compelled to do so again during the life of his superiors.[26] Whatever the true meaning, there is no evidence of a contrary practice.

(4) After the lord has examined the charter he must at once return it to the vassal without asking for or retaining a copy.[27] At first sight the cases on this point seem to be contradictory. In 1398, before the court of the Lady of Yester and her bailie, Henry Cockburn (who had presumably been summoned to show his holding) produced some charters by which he claimed to be entitled to certain lands. The Lady of Yester pointed out that she, being a woman, was bound by the counsel of her friends, and therefore asked for copies so that she could take advice. This was refused, Cockburn saying that he was not bound to allow such a thing.[28] About a hundred years later when Lord Lindsay in a similar action had a single clause near the end of a charter copied,[29] no objection was made. The

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[23] c. 25. 2.

[24] The words do not appear in the Bute, Cromartie, Colvil, Lambeth or Alexander Foulis MSS., or in Adv. MS. 24.4.13. They first appear in the Monyet MS. (1488).

[25] p. 478.

[26] *Dunfermline Regality*, p. 86.

[27] c. 25. 3.

[28] *Yester*, No. 40.

[29] Dundas Charters, Mac. XIV, No. 14.

matter is made clear by Balfour,[30] who says that the vassal should give a copy, not of the whole writ, but of so much of it as is necessary—that is, the name and place of the land, the manner of holding, the *reddendo* and the terms of payment.

From now on there is no shortage of examples of the action. In *Lord Yester* v. *John Leys* (1375) when the appointed day for showing the holding arrived the defender averred that his charters had, along with all his goods, been burned, and begged that the superior would, as an act of grace, appoint an assize to establish the terms of the lost charters; in other words he wanted to "prove the tenor." The superior agreed, and an assize was sworn. Though many findings were made about the defender's holdings it can be inferred from the record that the only matter seriously in dispute was whether Castleward, Merchet and Herezeld were due by the defender. The assize, finding in the defender's favour, said that the lands were held free from Bludwyt, Merchet, Herezeld, Castleward and all suits of Court.[31]

The next case, in 1377, is that in which the Earl of Moray, as Lord of the Regality of Moray, compelled James Stephenson to show his holding in the court of the Justice Eyre of the Regality. Stephenson's reply was that he held his land of the pursuer in fee and heritage, and that he had obtained it from two sisters. He produced a charter in their favour. It was pointed out on the pursuer's behalf that no vassal could sell or alienate land without the consent of the superior. To this Stephenson answered that the alienation by the sisters had in fact been confirmed by the pursuer's grandfather, but that this charter of confirmation had been destroyed by fire. After he had found caution for the truth of this statement an assize was sworn, who declared that they had often seen and heard the confirmation read in several courts of the Regality—and accordingly Stephenson won his case.[32] Another interesting case from the north was *Lord Badenoch* v. *Bishop of Moray* in 1380. The Bishop, summoned to show his holding in the pursuer's court, instead of entering the court stood outside it and protested that he did not recognise the pursuer as superior of the lands held by himself and his church, and said that the true superior was the King. In other words he " disclaimed " the pursuer as his superior. Now, the rule in such a case was that a vassal disclaimed at his peril: if he was proved correct, all well and good, but if he was wrong he lost his land as a punishment. This being so, the Bishop maintained that the action of showing the holding could proceed no further, and that the true point at issue was simply whether his disclamation was justified. But Badenoch refused to stop, and eventually decree against the Bishop was pronounced. The latter left the court, having warned the pursuer's *ministri* not to execute the decree, under pain of royal and ecclesiastical sanctions. The parties met on rather friendlier terms the next day. Badenoch, persuaded that the decree had been wrongly pronounced and was of no force, ordered that the record of the case be cut from the court roll and burned by a notary.[33]

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[30] p. 477.

[31] *Yester*, No. 32.

[32] *Innes*, p. 63.

Shortly after this the Bishop of Aberdeen held a series of courts to compel his vassals to show their holdings. In 1381 Sir William Keith and others were cited,[34] and a year later Reginald Chyne.[35] The latter had no charter, nor did he put forward any excuse such as loss by fire. He was allowed to prove the terms of his tenure, and, after the assize had found in his favour, he was allowed to take the oath of fealty in presence of the court.

It was on the same day as Chyne's case that an action against John Crab was heard. He claimed his land by virtue of a charter granted by a former Bishop and his Chapter in favour of Crab, his wife, the survivor and two heirs successively. He produced the charter, which was read. On the Bishop's behalf four arguments against the validity of the charter were submitted:

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[33] *Moray*, No. 159.

[34] *Aberdeen*, I, p. 135.

[35] *Ibid.*, p. 141. *Cf.* Alexander Irvine's case, *loc. cit.*

(1) A Bishop, being only an administrator, had no power to alienate church lands for longer than his own term of office.

(2) Only nine out of twenty-two canons had consented to the charter, instead of a majority, as the law required.

(3) Church lands could be alienated only for beneficial consideration (*causa*)—but the defender's charter had been granted simply on account of the affection that the former Bishop had had for his kinswoman, Crab's wife.

(4) The defender was in breach of the terms of the charter in that he had not implemented an obligation to build on the land.

After sundry procedure decree was given in the Bishop's favour.[36] Against this decree the defender appealed by falsing the doom in the Sheriff Court.[37] As was customary he alleged that the doom was "*in se putridum et corruptum*," and he submitted his arguments in the form of a written memorandum. This document,[38] drawn up by a lawyer of great skill, is most interesting as being one of the very few surviving Scottish examples of medieval legal scholarship. It extends to well over 2,000 words and is characterised by its close reasoning and by its references—more than forty in number—to books of Civil, Canon and Feudal Law. Though there are several references to the Books of the Feus and to the Institute, Digest and Code of Justinian, it was on Canon law that this pleader was most expert. The *Decretum* of Gratian, the *Decretales* of Gregory and the *Liber Sextus Decretalium* of Boniface VIII are frequently cited, while the commentaries with which he showed himself to be familiar were among others Azo's *Summa*, and the *Speculum Juridicale* of Durandus. The Bishop had meanwhile taken counsel's advice, whose opinion, in the form of answers to seven questions of law, is preserved.[39] It is disappointing to find that Crab, who employed by far the better lawyer, must in the end have lost his case.[40]

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[36] *Aberdeen*, I, p. 143.

[37] *Ibid.*, p. 145.

[38] *Ibid.*, p. 146. *Cf.* the legal opinions in *Lindores*, pp. 200, 212, the first of which, dated about 1380, dealt incidentally with a vassal's liability to show his charters.

[39] *Aberdeen*, I, p. 153.

Yet another Highland example from this period is *Earl of Buchan* v. *Terrell*, decided at Dingwall in 1383. Once again, loss by fire was the defender's story.[41]

The earliest full account of proceedings in a Baron Court in Scotland, a roll[42] among the Keith Murray writs, is the record of a case of showing the holding. Sir Patrick Grey, as lord of the Barony of Longforgan, held a court there on a mound called the "hund-hil" on January 16. After the court had been fenced the Sergeant, being asked whether he had executed a precept for summoning the tenants of three pieces of land, answered that he had done so last November. The tenants were heirs portioners, which meant that their husbands were summoned as well. They were supposed to appear that day "to show how and for what cause, through what charter or evidents they hold or claim to hold" the lands in question, but were absent. The court's decision, given by the dempster, was that the defenders should be fined and summoned to appear on February 3. On that day, and once more on February 25, the defenders failed to appear, with the same result. But on March 8, one defender, Sir Thomas Hay, at last appeared. He asked that the fines for contumacy that had been imposed should be remitted, a request that was probably granted. When asked about his charters he answered that he had none, and asked for a continuation. By agreeing not to pronounce decree until April 21, Grey in effect granted the continuation, but when that day arrived he would delay no more. The dempster pronounced that the lands should "dwell in the hands of the foresaid Sir Patrick and his heirs" until the defenders should recover them "either by grace treaty or process of law." "And thus ended the process," wrote the clerk of the court. But it was not ended for long. Hay, perhaps responding to the invitation to recover the lands by process of law, raised the matter again shortly afterwards. A notarial instrument among the Yester Writs[43] shows that Grey, sitting in judgment on the same hill, summoned Hay on behalf of the heirs portioners to have the whole question decided of new. This time Hay asked for the verdict of an assize, who declared that the defenders held the lands of Grey for ward, relief, homage and service. That settled the main point; a subsidiary dispute about the form that the homage was to take made the matter drag on even longer.

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[40] The Bishop was in a position to make a grant of the land in 1388: *ibid.*, p. 183.

[41] *Cromarty*, II, No. 526.

[42] Described in H.M.C.Rep., III, 410. The dates are impossible to reconcile without reference to the original. For the time being the date of 1385 given in the H.M.C.Report must be accepted.

This case is one of the few examples from the south of Scotland during this period. It is difficult to see why the action was so common in Aberdeen and further north. Was it, perhaps, that in the closer community of the south, the terms of a vassal's charter were more likely to be known to the superior? An unusual notarial instrument of transumpt survives among the Makgill Charters in the Register House[44] which narrates that at a concourse of people assembled for a tournament on the sands of Eden, near St. Andrews, in 1382, John Ramsay asked the notary to read and expound in Scots two Latin Charters, which are then recited in the instrument. If charters were habitually made public in this way there could have been little need for the showing of holdings; but it must be admitted that writs of this kind are rare.

It was not always on his own behalf that the superior commanded the production of charters. For instance, in 1400 the Duke of Albany summoned Sir John Wemyss and John Glen to produce documents showing why Robert Livingston was not in possession of certain lands. The case ends with a protest by the defenders that they had not been properly cited and that the majority of the assize were suspect[45]; but it seems clear that if the defenders had lost the case the lands would have reverted not to the superior but to Livingston. What was happening in effect was that Livingston was suing Wemyss and Glen to recover the lands, but without using a brieve of right (which would have been necessary in a straightforward action) and without having to establish his own right to the lands by showing *his* charters.

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[43] *Yester*, No. 35. The date is given merely as 1386.

[44] Makgill Charters, Box I, No. 6.

[45] *Wemyss*, II, No. 31.

It was at about this time that the first statute may possibly have been passed about showing the holding. Skene printed it as Chapter 36 of the Acts of Robert III, but it was of such doubtful authenticity that it was omitted from the Record Edition of the Acts. There appears to be no extant manuscript source for this " Act " except for a passage in Balfour's *Practicks* in almost identical terms. The authority cited in Balfour is not an Act of Parliament so much as a judicial decision of 1563.[46] However a perusal of the manuscript Acts and Decreets[47] shows that this decision is most unlikely to have been an authority for the proposition stated by Balfour. The only thing to be said in favour of the " Act " is that it does state a number of rules which are in fact not inconsistent with charter evidence of the day.

The first undoubted Act was passed in 1424,[48] and it dealt only with Crown vassals. James I had just returned from captivity in England and wanted to take stock of his possessions. It was therefore enacted that Sheriffs should hold inquiries into the royal possessions and annualrents in their sheriffdoms, and to assist in this the King was given power (which he had at common law in any event) to summon his tenants to show their charters and evidents. The operation of this Act is well illustrated by an entry in the Exchequer Rolls stating that the bailies of the burgh of Kinghorn, which had been set by the Crown in feu-farm, were prohibited from paying out the feu-duty to two claimants, but that the claimants could establish their claims by showing their evidents to the King and his Council.[49] Crown rentals, which first came to be drawn up in the fifteenth century, could hardly have been compiled without examining the charters of crown vassals.[50] Unfortunately the action came later to be used by the Crown not as a purely administrative measure, but as a political and fiscal weapon. A series of cases arose in 1500 and shortly after which illustrate this. John Gordon of Lochinver lost, among other lands, the Isle of Lewis for his failure to produce charters[51]; and on one day in 1501 decree in absence was given against four defenders and *in foro* against three, for the same reason.[52] Some of the cases took a different course: for instance John Murray had died and the case against him was continued so that his heir could be sisted,[53] and James Hering's case was continued so that his son Andrew (to whom James alleged he had disponed the fee of his land, reserving a life rent to himself) could be added as a second defender.[54]

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[46] *Ogilvy* v. *Ogilvy*, December 9, 1563, Balf. pp. 478–479.

[47] Vol. 28, ff. 103 *et seq.*

[48] 1424 c. 9; A.P.S., II, p. 4.

Walter Heriot was brave enough to disclaim the King as his superior, alleging that he held his land of one John Lumsden. Lumsden was therefore sisted in Heriot's place as defender, and Heriot thereafter appeared in the case only as one of Lumsden's procurators. Lumsden produced some charters, but the Lord Advocate pointed out that one of these bore to have been granted three years after an Act of Annexation, by virtue of which the land had become inalienable except with the consent of Parliament. Lumsden eventually produced a charter dated before the Annexation; but the final result is not known.[55]

Such was the success of most of these actions[56] that the Council, in 1504, tried to persuade the King to " charge every barroun and frehalder quha held lands of the crown, to produce thair evidentis beirand the maner of the halding of thair landis; and in case the same wer not sufficient . . . the landis be rigour of the lawe mycht be decernit to becum in the Kingis will"; but the King refused to do this, with the result that he "conqueist gret favour of his people, and the inventouris of that practise greit hatrent."[57] James VI did not, it seems, have quite such a tender conscience: in 1590, tenants in the "Debatable Lands" were ordered to show their evidents[58]; and it appears that the powers at common law and under the 1424 Act were not wide enough, for in 1592[59] and 1597[60] crown vassals (or certain classes of them) were ordered by Act of Parliament to show their holdings. The Aberdeen Burgh Accounts for 1592–1593[61] have an entry: "Item, to Jhone Browne, messenger, quhen he brocht the charge to produce the townis halding, 30s.," and there is quite a lot of material in the Register of the Privy Council to illustrate the operation of the 1597 Acts.[62] There was a final Act in 1685,[63] by which time (as will be shown) the common law action had fallen out of use.

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[49] E.R. IV, p. 396. *Cf.* pp. 463, 491.

[50] E.R. IX, pp. xxxiii, 563 *et seq.*

[51] A.D.C. II, pp. 446, 451, 458; *cf.* Gregory's *Highlands*, p. 95.

[52] A.D.C. II, pp. 491-493.

[53] *Ibid.*

[54] *Ibid.* The case became very complicated in its later stages, since John Stewart raised an action against the same defender, which was eventually settled by arbitration. The Lord Advocate seems to have abandoned his case: A.D.C., III, Nos. 39-41, 47, 125, 131, 146-147, 319, 378.

[55] A.D.C. III, Nos. 118, 130, 133, 145, 148.

[56] See also A.D.C. III, Nos. 101, 107, 424, 487.

Returning to actions by subject-superiors, it is found that they continued at a fairly steady rate in the fifteenth century. For instance, in about 1423 Sir William Hay, Constable of Scotland, had won an action of showing the holding of the lands of Brogan, so that when, thirteen years later, Richard Hay tried to claim the lands as his, Sir William was able to put forward a successful plea of *res judicata*.[64] Lord Lindsay ordered all his tenants to produce their charters to him in 1494,[65] and Sir William Dundas did the same thing in 1501.[66]

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[57] Lesley's *History*, 1830, p. 73.

[58] R.P.C., 1st series, IV, p. 799.

[59] 1592, c. 131 (A.P.S., III, p. 564, c. 44).

[60] 1597, c. 245 (A.P.S., IV, p. 133, c. 16); 1597, c. 262 (A.P.S., IV, p. 138, c. 33).

[61] *Spald.ClubMisc.*, V., p. 116.

[62] R.P.C., 1st Series, V, pp. lxxvi, 467, 510, 544–545. See also *Extracts from Records of Stirling*, p. 87.

[63] 1685, c. 9, R.P.C., 3rd series, XII, pp. 441, 461, 464.

[64] *Aberdeen and Banff Collections*, p. 393.

[65] Dundas Charters, Mac. XIV, No. 14.

[66] *Young*, No. 1179.

The procedure in actions of this kind had never been quick, and by the mid-fifteenth century the necessity to hold at least five courts before decree in absence could be given (which was the number held in the Longforgan case [67]) was well established. This fact is shown by the many styles for actions of showing the holding that are to be found in the manuscript collections of "Auld Lawes" in the National Library and elsewhere. The earliest,[68] dated 1450, is unfortunately damaged, the top half of each leaf of the manuscript being torn away at this point. The next,[69] dated 1455, has been printed by Thomas Thomson in his *Compilation of the Forms of Process*,[70] while a style usually dated 1480 is to be found, in whole or in part, in at least six later manuscripts,[71] and was the one copied by Bisset when he compiled his *Rolment of Courtis.*[72] The procedure, as shown by these styles, was roughly as follows:

(1) The superior directed a precept to his Sergeant, charging him to pass to the chemise (chief dwelling) of the lands, and there to summon the defender to appear. This the sergeant did before two or three witnesses; and the precept was endorsed with a certificate of citation.

(2) At the first court [73] the Sergeant was asked whether he had executed the precept, and if he had he answered "yea" and handed the precept to the clerk, who read both it and the certificate. The witnesses swore to the citation, and the defender was then called upon to appear. If (as was likely) he was absent, the pursuer moved the court to find the defender in default, and to order a new citation. This was done, and the case was continued.

(3) At the second and third courts the same thing happened, except that the Sergeant might mention that he

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[67] H.M.C.Rep., III, p. 410.

[68] Edin.Univ.MS., Borland No. 206, f. 110.

[69] Adv. MS. 25.4.15, f. 175.

[70] p. 235.

[71] Drummond MS.; Monyet MS. f. 365; Harleian MS. f. 264; John Bannatyne MS.; Lambeth MS., f. 184; Malcolm MS., f. 421.

[72] I, pp. 300 *et seq.* *Cf.* Balf., pp. 479 *et seq.*

[73] As to the *induciae*, see Craig, 3.5.10.

had poinded some part of the defender's property, such as a horse, as security for his eventual attendance.

(4) The only difference at the fourth court was that a final warning was given to the defender that decree would be pronounced at the next court, and the style of citation was therefore slightly altered.

(5) At the fifth court, decree passed in absence. The doom, pronounced by the dempster, ordered that "the saidis landis . . . remane and abyde in the handis of the said Lord . . . ay and quhill they be recovered out of his hands as law will."

(6) Of course, if the defender appeared at any of the first four courts the procedure was different. He first asked for the records of the previous courts to be read, and might base his defence on some informality there; or he might plead that he had not been properly cited,[74] supporting his argument by a reference to *Regiam Majestatem*. If these dilatory defences were repelled he had to "satisfy production" by showing his charters, but was entitled to have them back "haill and feir as he delyvered theme and uncopied." Questions could be put to him about the manner of his holding, which he was bound to answer. But the court could not question the validity of an *ex facie* regular charter.[75]

Any extra complication arising during the case might make even more diets necessary. Thus when the Bishop of Aberdeen, in 1532, raised an action in his own court for showing the holding of the lands of Ardlar, though the defenders were initially absent, it took over a year—seven courts in all—for decree in his favour to be given. The reasons for the delay were that each party asked for a continuation (one for so long that new letters bailiery had to be issued) and that Alexander Seton intervened in the case, protesting that he had bought half of Ardlar from the defender, to which the Bishop answered that Seton had "producit nane evident tuiching the halff landis of the said Ardlar but wordis allanerlie except ane precept of seysing without charter or ony other evident followand thereapone."[76] Quite apart from these complications, this case shows that there was even more paper-work involved than there had been in 1480; for the defenders were now summoned to each court by a fresh precept, and the record ends with the "*tenor sentenciae*" in addition to the proceedings of the final court. The "process" in this case consisted of at least twenty documents.

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[74] See *Wemyss*, II, No. 31.

[75] See Mackenzie's *Observations*, p. 295.

No less than thirty-nine defenders were summoned in 1532 by the Abbot and Convent of Dunfermline, and by the Archbishop of St. Andrews as administrator of the fruits of the Abbey, to show their charters of certain acres of land near Dunfermline Burgh. The provost of the Burgh appeared as procurator for certain of the defenders, and managed to satisfy the court that they held their lands by burgage tenure and were not tenants of the Abbey at all. Some of the other defenders satisfied production, and some remained absent. Thomas Cowpar, though not cited, intervened to protest that he was sub-feuar of one of the absent defenders, and would not be prejudiced by the court's decision. The case was continued so that absent defenders could be dealt with, and also in order that a difficult point of law about a charter with neither date nor seal could be settled; but for some reason the pursuers did not proceed further with the case.[77]

Those defenders who had been able to show that they held burgage were not, of course, bound to produce charters in the Abbot's court. On the other hand there is evidence to show that they might have been liable to show them in the burgh court, though examples of the action within burgh are rare. In 1541 the provost and bailies of Elgin assigned a day to John Forsyth and four others to produce the evidents of their lands so that they could be entered in the "soitroll,"[78] and several years later a precept was raised against the inhabitants of Leith "for schawing thair evidents."[79]

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[76] Adv. MS. 16.1.10, ff. 147 *et seq.*; transcribed in Adv. MS. 35.3.4, pp. 379 *et seq.* Printed in part in *Aberdeen*, I, pp. 387 *et seq.*

[77] *Dunfermline Regality*, pp. 57, 61, 68–69, 74, 80, 85–88.

The Court of Session was founded in 1532, and Scotland had for the first time a fairly strong central court. At the same time the power of the heritable jurisdictions—the baronies and regalities—was waning. It is not surprising to find that in these circumstances superiors started bringing actions of showing the holding before the Lords of Council and Session, instead of in their own courts. Hitherto practically the only actions of this kind in the Royal courts had been those pursued on the King's behalf, but in Balfour's *Practicks*[80] are cited a number of sixteenth-century cases brought by subject superiors in the Court of Session. Among the propositions of law found in Balfour are that a defender who falsely denies that he has a charter loses all right to the land, unless he can prove that he made a honest mistake; that the grantor of a deed cannot himself order its production (in other words the action becomes competent only after the grantor's death); and that the superior is entitled to a copy of a part of any charter produced.

The most significant case in Balfour is *Lord Somerville* v. *Cambusnethan* (1575)[81] in which it was held that a superior had no title to sue unless he first proved that he was seised in the superiority. This might seem today to be an obvious rule, but it was in fact a complete novelty. In the past the superior's title had always been presumed, and oddly enough the only cases in which superiority titles were proved were a few actions brought by the King.[82] Of all superiors, surely the King has the least reason to have to prove his title, since it is presumed that he is overlord of all except allodial land.[83] The rule in *Somerville* v. *Cambusnethan*, confirmed in 1605 in *Dalziel* v. *Dreghorn*,[84] virtually brought actions of showing the holding to an end. With the exception of a few cases under the 1685 Act, not a single example is to be found after the very early seventeenth century. The merit of the action, so far as the superior was concerned, had been that the onus never lay on him to do anything: it was for the defender to decide whether (at his peril) to disclaim, and it was for the defender to produce his titles. After 1605 no superior would be rash enough to raise such an action, the result of which might be merely to expose defects in his own title. There were other reasons for the decline of the action. Superiors were becoming more careful to keep accurate records of what charters they and their ancestors had granted[85] and of course after the founding of the Register of Sasines in 1617[86] the terms of any instrument of sasine could easily be established by searching the register, and without having to see the original deed.

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[78] *Elgin*, I, p. 55.

[79] *Edinburgh Records*, 1573–1589, p. 403.

[80] pp. 477 *et seq.*

[81] Balf. p. 478. *Cf. M.* v. *M.* (1582) Mor. 3555.

[82] *e.g.*, A.D.C., II, p. 446, where the Exchequer Rolls were referred to for this purpose.

[83] Mackenzie's *Observations*, pp. 7, 295.

When Balfour's *Practicks* was written (in about 1579) the action was already on the way out, though the compiler may not have known it. Craig's *Jus Feudale*[87] (c. 1600) gives detailed rules about the action, mainly as to the *induciae* between each court held in the defender's absence. While Bisset[88] regarded the action as competent (which indeed it still was) it is significant to notice that he gave a style that was about 130 years old by the time he wrote. Hope[89] and Spottiswood[90] were the last writers to mention the action without adding that it was in desuetude. Thus Mackenzie in 1686 said[91] that, "the ordinar way is by an improbation"; and by the time of the great institutional writers of the eighteenth century the action was considered to be "long since in disuse."[92]

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[84] Mor. 3555.

[85] See *e.g.*, *Edinburgh Records* 1589–1603, pp. 124, 159.

[86] Act, 1617, c. 16.

[87] 3.5.10.

[88] I, pp. 12, 137, 300 *et seq.*

[89] *Maj.Prac.*, VI, 33.

[90] *Practicks*, p. 311.

[91] Mackenzie's *Observations*, p. 7; *cf.* p. 295. See also Stair, 3.5.49.

[92] Bankt. I, p. 616. See also Ersk. 2.5.3.

It only remains to mention the action that was used instead. It was called "reduction–improbation,"[93] and bore many resemblances to showing the holding: for instance, it was not neccessary[94] to specify the writs to be produced (which was essential in an ordinary reduction). The main difference was that, whereas in showing the holding it was not possible to impugn the validity of a deed *ex facie* regular, in a reduction-improbation it was essential to do so, either as a fact or else as a legal fiction. This was called "improving"—that is, *dis*proving—the deed. Forgery had to be alleged, with the result that the action, being made quasi-criminal in nature, could be brought only with the consent of the Lord Advocate. It was a much more versatile action than showing the holding. For instance, petitory conclusions for removal or for payment of bygone rents could be added. Superiors had to prove their own titles, but the advantages of the action were such that they no longer minded the slight risk of showing up their own defects. A disadvantage was that the action lay only in the Court of Session. But it was becoming increasingly easy for cases in the inferior courts to be brought compulsorily before the Court of Session by advocation, with the result that the superior's power to sue before his own court was ceasing to be of so much value in practice.

Though reduction-improbation had been known by the late fifteenth century, the first reported example of its use as a substitute for showing the holding was in 1623.[95] Thereafter cases appear fairly regularly in the reports, latterly always combined with an action of declarator of non-entry. When the casualty of non-entry was abolished in 1874,[96] reduction-improbations between superior and vassal therefore died out as well, the last case in the reports being *Mackintosh* v. *Tytler* in 1870.[97]

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[93] See Hume's *Lectures* IV, p. 268; Maclaren's *Practice*, pp. 702 *et seq*.

[94] Though it was necessary at one time: *Lord Advocate* v. *Montrose* (1648) Mor. 6666.

[95] *Master of Lauderdale* v. *His Vassals*, Durie, p. 63; Bro.Sup.I, p. 8.

[96] Conveyancing (Scotland) Act, 1874, s. 4.

[97] 8 M. 772.

THE INFLUENCE OF INSURANCE UPON THE ACCEPTANCE OF LEGAL LIABILITY FOR ACCIDENTS

THE law of liability for accidents being, like all rules of conduct in society, an expression of ideas in the minds of men, it is subject to the varied influences which bear upon the thoughts of those directly involved in administering the law. One such influence is that of insurance: its presence cannot be ignored by any person dealing with legal liabilities howsoever much he may protest that this is of no interest to him.

Legal liability for accidents, in general, is a branch of the law of tort. It is possible for such liability to arise in contract but, in general, such contracts merely suffice to shift a tortious liability from one party to another. The first question to be answered, therefore, is "What is the function of the law of tort?" A tort being defined as "A civil wrong not arising in contract or by breach of trust," the law of tort is the law relating to reparation for such wrongs. A person having been injured by the negligence of another, having been libelled by his malicious act, his goods having been converted to the use of another, society in the form of the State has for centuries decreed that the injured person is entitled to compensation for the wrong suffered and the ultimate sanctions of the State will be forthcoming to coerce the wrongdoer into making reparation. The law therefore states that a duty is placed upon all persons subject to the jurisdiction of the courts to refrain from committing any of the torts known, and probably to refrain from any act which may be construed as a tort although not yet nominate. If the duty assumed to exist is breached, then the tortfeasor, having injured another person, must compensate him for the damage done. In strict theory, therefore, the fact that the original tortfeasor has contracted with another party that such damages shall be refunded to him is quite irrelevant. Whether or not in practice it is irrelevant is the purpose of this study to decide.

The second question requiring an answer is " What is insurance and what is its function? " that its effect upon the law of tort may be examined. Insurance is the bearing of individual risks by the community of those participating in the insurance fund by means of which a loss which would be catastrophic for an individual is shared among many at little individual cost. The function of insurance is to give cover to those subscribing to the fund.[1] The natural corollary to this is to pay the claims which arise within the scope of the insurance. The contractual duty owed by insurers therefore is to the policy holders and no duty is owed under legal liability policies to the third parties seeking compensation. The policy states that the insurer will indemnify the insured in respect of his legal liability: if the insured is liable the insurer will pay the damages awarded. By policy conditions the insurers reserve to themselves the right to deal with any claims made, and the effect of this will be considered later. The function of insurance as here defined does not envisage a general fund from which all who suffer loss or injury may claim compensation. Such a fund exists in part in the social security benefits of National Insurance and the Industrial Injuries Scheme. The relationship of this type of social insurance to legal liabilities for accidents will not be specifically dealt with. Whether or not it is desirable to create such a reserve for social insurance from the general insurance fund is a contentious point[2] and greatly wrapped up in political prejudice, but to the majority of insurers the suggestion is unwelcome. To a certain extent the legislature has ensured that in respect of certain accidents insurance shall be available to meet any liability, but it has gone no further. It has also for many years ensured that persons suffering injuries arising out of and in the course of their employment should have a right to compensation irrespective of tortious liability and the influence of this legislation will be considered.[3]

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[1] See particularly D. E. Hughes, " The Function of Insurance in a Changing Economy," *Chartered Insurance Institute Journal*, Vol. 49, p. 99.

[2] See Fleming James Jr., " Accident Liability Reconsidered—the Impact of Liability Insurance " (1948), 57 Yale L.J., p. 549 (to this article the writer is greatly indebted).

Such knowledge of the purpose of insurance may be presumed common to all who are involved in dealing with the law. In *Tattersall* v. *Drysdale*[4] Goddard J., as he then was, said: " [The Road Traffic Act, 1930,] was aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car."

The judges in the courts, so far as they are able, attempt to ignore the existence of insurance when it is not directly relevant although from time to time encouraged by counsel to consider it. In *Semtex, Ltd.* v. *Gladstone*[5] Finnemore J. said: " Counsel for the defendant put it in these actual words ' The whole matter is now changed because of motor insurance.' I propose to deal with that in more detail in a moment, but I want to say that I have come to the conclusion that it does not in any way change the law of the country "; and later: " The rights of the plaintiffs do not depend on the ability or inability of the defendant to satisfy any lawful judgment that is given, nor does a judgment given depend in any way on the fact that one party, or both parties, or no party, has or have in the background an insurance company on which they can rely. The fact that people are insured in respect of this or that risk does not in the least alter the principles which the court has to apply in deciding what is the law."

This is in general the attitude adopted by the courts but comparison should be made with the dissenting judgment of Denning L.J. in *Romford Ice and Cold Storage Company, Ltd.* v. *Lister*.[6] In that case a father and son were both employees of the plaintiffs. The son, by negligence in the execution of the duties of his employment, injured his father, who sued the plaintiffs. They were insured under two policies, a motor-vehicle policy and an employers' liability policy, the latter of which permitted the underwriters to prosecute in the name of the insured for their own benefit any claim for indemnity or damages. The father recovered damages from the plaintiffs for his injuries. The underwriters then, in the plaintiffs' name, claimed contribution from the son as a joint tortfeasor. Denning L.J. said [7]: " I turn therefore to the merits of the case. Under the statute [the Law Reform (Married Women and Tortfeasors) Act, 1935], if there had not been any insurance questions involved, the task of the court would have been comparatively simple, *viz.*, to find out what would be just and equitable as between master and servant having regard to the extent of their respective responsibility for the damage and to order the defendant to pay his proper share (see section 6 (2) of the Act of 1935). This case is much complicated, however, by the insurance factor.

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[3] See also Hughes, *Jurisprudence*, Chap. 20.

[4] [1935] 2 K.B. 174.

[5] [1954] 2 All E.R. 206.

[6] [1956] 2 Q.B. 180.

" The plaintiffs were insured under two policies. First, they were insured against liability to their employees under an employers' liability policy. Secondly, they were insured against liability for motor accidents under a motor-vehicle policy which enured for the benefit of themselves and their drivers, but it did not cover liability to their employees. The father's claim was clearly covered by the employers' liability policy. The insurers have paid under that policy and are the real plaintiffs in the action.

" Counsel for the plaintiffs invited us to ignore this question of insurance, but I do not think we should blind ourselves in this way. It is undoubtedly true as a general rule that the court is not concerned with the fact that the plaintiff is insured or that he has been paid by his insurance company. That has been so ever since the days of Lord Mansfield; but it is equally true that the insurers that stand behind the action take the plaintiff as they find him, and if, for some reason or other, he is debarred from making a claim they fall with him"; and later[8]: "If, and in so far, as the claim rests on the statute it comes within the express power of the court 'to exempt any person from liability to make contribution.' This seems to me to be an appropriate case in which the court should exercise this power. Whichever way it is put, however, I am clearly of opinion that an employer, who has been fully indemnified by his own insurance company, should not be allowed to turn round and sue his servant for a contribution or indemnity."

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[7] p. 191.

These sentiments were not shared by the other two Lord Justices of Appeal[9] but the clue is given by Denning L.J. himself in his reference to the position as from Lord Mansfield's day. The legal duty ignores insurance however unjustifiable morally it may be considered to do so.

In such cases as these the question of insurance is forcibly brought before the court but in general the question is not raised explicitly, however conscious the parties may be of it in fact.

That it is the intention of the legislature that persons suffering injuries from the driving of motor-vehicles should be compensated where there is legal liability is clear and an action for breach of statutory duty will lie if the provisions of the Road Traffic Act, 1930, are not complied with. Such was decided in *Monk* v. *Warbey*[10] where the legal position was very clearly expounded by Greer L.J. who, after summarising the provisions of the Third Parties (Rights Against Insurers) Act, 1930, and the Road Traffic Act, 1930, concluded: "How could Parliament make provision against such risks if it did not enable an injured third person to recover for a breach of section 35 of the Road Traffic Act, 1930?"

Perhaps this principle was expressed even more forcibly in *Gregory* v. *Ford and Others*,[11] where a cyclist injured by negligent driving of a lorry recovered damages from the owners of the vehicle. The owners were insured but, owing to non-compliance with a condition, the lorry was not covered at the time of the accident. They claimed indemnity from the driver for the damages paid and he claimed damages from them for having been made to drive an uninsured lorry. It was held that he was entitled to recover from them the amount of damages which he was liable to pay the injured plaintiff, since making him drive an uninsured lorry was a breach of an implied term in his contract of employment with them. Their claim against him was rejected since their liability was due to their own breach of duty in having their vehicle uninsured at the material time.

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[8] p. 192.

[9] Birkett and Romer L.JJ.

[10] [1935] 1 K.B. 75, 80.

[11] [1951] 1 All E.R. 121.

In the Workmen's Compensation Act, 1925, section 7 (1) provided: " Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then in the event of the employer becoming bankrupt . . . the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman . . ." And this provided a precedent for the Third Parties (Rights Against Insurers) Act, 1930, section 1 (1) of which provides: " Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then:—[in the event of the insured becoming bankrupt etc.] if, either before or after that event any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

These two Acts provided that a third party should not be penalised by the bankruptcy of the insured, but the third party then had no better claim to indemnity than the insured himself and if the insurer could evade liability to the insured so could he to the third party standing in the place of the insured. This was also a defect in the Road Traffic Act, 1930, which introduced compulsory motor insurance in respect of personal injuries to third parties, but the Road Traffic Act, 1934, amended this by sections 10, 11 and 12, which require the insurer to satisfy any judgment against the insured quite irrespective of the rights of the insurer to avoid the policy. The insurer is given a right of recovery against the insured should he be compelled to make a payment in such circumstances.

This stress on the rights of third parties to compensation from an insurer was echoed in the Workmen's Compensation (Coal Mines) Act, 1934, which made insurance in respect of Workmen's Compensation in Coal Mines obligatory while by section 3 (4) the insurer was prevented from avoiding liability under the policy, again with a saving clause of recovery against the insured.

It is clear that there has been a movement towards the enforcement of a contract of insurance for the benefit of the third party injured, but, apart from Workmen's Compensation, no direct move to ensure compensation irrespective of tortious liability. In theory, therefore, legislation has left this exactly where it was. The Motor Insurers Bureau which was created to fill in the gap left in the field of Motor Insurance by the Road Traffic Acts, does not affect the incidence of liability any more than motor insurance affects it, but it does make a contribution of importance in that it increases the assurance of compensation being available where liability is proved.

Although Parliament has not altered the rules of liability and the courts expressly deny any move to base legal liabilities upon the question of insurance, yet the practices of insurers have definite effects upon the rules of liability. The elementary basis of indemnity insurance is that the insured having discharged his legal liability is thereafter indemnified by the insurer. In general, for practical reasons, insurers handle the claims themselves troubling the insured as little as possible and the cases they settle or contest may be chosen upon grounds peculiar to the insurer alone. Since the creation of the Motor Insurers Bureau, even when insurance as required by the Road Traffic Acts is lacking, an accident which would give rise to a claim under such a policy, if it was in force, will be dealt with by an insurer acting for the Motor Insurers Bureau. It follows that by far the great majority of motor accidents are covered by insurance, and as the majority of employers' liability and public liability claims are also insured the cases which finally come to trial are largely cases chosen by insurers. These cases fall into three main classes:—

(1) A minority of cases which turn upon some point of law which is not clear. Such cases include *John Summers and Sons Ltd.* v. *Frost* [12] where the point was whether or not a grinding-wheel had been fenced so securely as to comply with the requirements of section 14 of the Factories Act, 1937. Another case was *Wormald* v. *Cole*,[13] which decided that damages for cattle trespass could be awarded for injuries to the occupier of land which naturally resulted from the trespass, and not solely for damage to crops and fences. In *Mottram* v. *South Lancashire Transport* [14] the Court of Appeal confirmed that a bus company could not be liable for unauthorised acts of passengers which led to accidents.

(2) A majority of cases which turn upon a matter of fact which is disputed. In most of these cases both sides are agreed upon the legal implications if the facts as alleged by the other side are proved, but cannot agree with the allegations. Such cases do not affect the law of liability unless the trial judge determines the case upon a point of law which surprises the parties. If such a case proceeds further it is as under heading (1) above.

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[12] [1955] A.C. 740. [13] [1954] 1 Q.B. 614. [14] [1942] 2 All E.R. 452.

(3) Cases where liability is admitted, or denied for tactical reasons only, and the only or main dispute is upon the quantum of damages. Such cases do not determine any principle of law, except in such rare instances as *British Transport Commission* v. *Gourley*[15] which dealt with what account may be taken of taxation when computing damages. The measure of damages may have to some extent been dissociated from reasonable anticipation of damage since the decision in *Re Polemis, Furness Withy and Co.*[16] and this has restricted the opportunities for disputes on law, the valuation of claims being basically one of fact.

There is a residual minority of cases contested by insurers for various reasons—some where the insurers are prepared to settle but are rushed into litigation by the precipitate action of the plaintiff's advisers. There are also cases resulting in litigation due to hostility between particular solicitors and individual insurers. Such cases essentially determine no point of law.

It is important to appreciate that in view of the choice by insurers of the cases to be contested the points of law which are referred to the courts for decision are those which in view of the insurers are obscure and not necessarily those which the legal profession regard as being in need of clarification. In addition some point of law may be obscure or be criticised yet not readily be referred to the courts. One such case in Scottish law is the decision in *Leigh's Executrix* v. *Caledonian Railway*[17] where the Inner House of the Court of Session ruled that an intimation of a claim by a person subsequently deceased was sufficient to enable his legal personal representative to prosecute a claim, even though no proceedings had been initiated by the deceased. This decision was criticised by the House of Lords in *Stewart* v. *L. M. S. Railway*[18] but to reverse the decision it will be necessary to carry an appeal to a court of Seven Judges or to the House of Lords and inasmuch as cases arising under the rule can usually be settled for a fairly small sum, insurers would hesitate before appealing such a case. Furthermore cases under the rule are infrequent so that several such cases spread over several years could be settled for the costs of an appeal, and the House of Lords might always uphold the rule. An individual who stood to be ruined by a decision under a doubtful rule would be more likely to hazard everything on litigation than would an insurer and to this extent insurers modify the rules of liability by not defending cases, just as they are instrumental in bringing other doubtful points into prominence.

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[15] [1956] A.C. 185.

[16] [1921] 3 K.B. 560. This probably does not represent the position in Scotland; see Glegg on *Reparation*, 4th ed., p. 39.

[17] 1913 S.C. 838.

[18] 1943 S.C.(H.L.) 19.

The object of litigation is primarily to settle disputes and the fact that the law may be clarified by it is only incidental to this. No attempt to use litigation for any other purpose will succeed, for the law is always changing to match public opinion illustrated by the interpretations of the judges, and by legislation. For this reason alone, if for no other, there would be no point in insurers attempting to clarify the law in every particular where it affected their interests.

The practices of insurers in the field of litigation, while important in determining points of law, have less effect upon the principles of liability than their practices out of court. Once a claim for personal injuries has been made, the claimant has a very good chance of being paid something. It is probable that in between 70 per cent. and 80 per cent. of claims for personal injuries the claimant receives something. There are various reasons for such a high percentage which is almost certainly higher than would be awarded by the courts if every case was contested. One reason is that in many cases it is cheaper to pay than to fight. Even a county court action is expensive in comparison with the cost of paying many small claims, with the possibility of an adverse decision always present. In the case of a High Court action the cost is considerable and since the advent of legal aid there is, in very many cases, little or no hope of recovering any costs in the event of a successful defence. The introduction of legal aid into the county courts will increase this influence upon the attitude of insurers.

Again, since the Law Reform (Contributory Negligence) Act, 1945, it has been possible to apportion damages in accordance with the measure of blame and has increased the chances of the plaintiff recovering some damages. Insurers probably pay more than a case is worth in such apportioned settlements but the question then is whether the difference between the parties is sufficient to justify court proceedings. Another reason is that, particularly where minor injuries are concerned, it is in the interest of public relations for an insurer to settle cases and settle them swiftly.

In the field of employers' liability there are two other features which have led to an increase in the number of claims made and to the chances of a payment being made. The repeal of the Workmen's Compensation Acts in 1948 and their replacement by the Industrial Injuries Scheme allows a workman to receive industrial injury benefit and also to prosecute a claim for damages yet to suffer no diminution of the benefit unless he succeeds in his common law claim. This has greatly encouraged workmen injured in the course of their employment to seek damages, and the abolition of the doctrine of common employment [19] has increased the chances of success.

From another point of view a manufacturer may be opposed to a court action in connection with his product which could lead to many other claims arising in like manner, while there is always the question of adverse publicity, for the maker of any product knows that the mention of such product in connection with litigation does very great harm. In such matters the insurer may have to deal with claims in a manner which is not the correct one according to the normal assumptions of legal liability.

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[19] By the Law Reform (Personal Injuries) Act, 1948.

Another way in which insurance can affect the incidence of liability is by the provision of group personal accident insurance. Basically the provision by the employer of a guaranteed payment to employees disabled by sickness or injury has no bearing upon his legal liability to those employees, but a regular weekly payment in lieu of wages has a definite deterrent effect upon an employee contemplating making a claim, especially when the employee has no equitable claim upon the insurer guaranteeing the payments. Cases are quite common where after an injury no claim is made until the period of benefit has expired and it is but reasonable to assume that in many other cases prospective claims are not prosecuted due to the fact that the injured person receives payment for the whole period of his disability. A group pension and life assurance scheme likewise has a tendency to reduce the incidence of claims by creating a more amicable atmosphere between employer and employee although the immediate effect is less than with a personal accident scheme.

Despite these features tending to reduce the number of some employers' liability claims there remain a very large number which are put forward as also there are many public liability and motor claims, and naturally many of such claims are worthless. As has been pointed out there are various reasons why insurers pay so many claims. A careful investigation of claims paid will reveal that if insurers contested every legal liability claim as a matter of course then the increase in cost would more than offset any probable saving due to final payments being required in fewer cases. After taking into account the effects of legal aid it is probably true that the defence would have to succeed completely in 50 per cent. of the cases for a system of automatic repudiation to be more profitable than the present one. This gives another and more cogent reason why insurers should rely largely upon their own judgment in deciding where liability lies and why they should be selective in their choice of cases to contest.

The function of insurance is to give cover and this is usually given by insurers in greater measure than is requested. By the terms of the Road Traffic Act, 1930, it is not lawful for a motor vehicle to be used upon a road unless there is a policy of insurance in force in respect of that use. This clause has led to motor policies including "other drivers" driving with the insured's permission or authority in certain circumstances. A personal liability policy will often also indemnify the members of the insured's family and a householder's comprehensive policy indemnifies also the spouse of the insured. As Professor Fleming James Jr. has pointed out [20] this is equivalent to deeming the insured vicariously responsible for the acts of the various other parties covered and granting him an indemnity in respect of this risk. Admittedly the premium is not increased, except in the case of motor insurance where a reduction is allowed if only one person drives, but this is indicative of no more than the probability of a claim. A personal liability policy in the name of the parent will indemnify the child who negligently causes injury to a third party when by no legal contrivance could the parent be liable in person. Even although until the Law Reform (Married Women and Tortfeasors) Act, 1935, a husband could in England be held liable for the torts of his wife [21] this has never extended to other members of the family, who are now covered by the insurance. There are circumstances when a parent may be legally liable for the acts of a child, when the child is of such an age as to require supervision, when the absence of such supervision is negligent, but that is a far cry from giving cover where no legal liability can exist. In motor insurance the cover extends beyond the bonds of the family for anyone driving upon the insured's authority is covered within the terms of the policy. An attempt to make the owner of a vehicle vicariously responsible for the negligent acts of persons he has allowed to drive was defeated in the Scottish case of *Lindsay* v. *Robertson*[22] and in England such an approach is manifestly disapproved by the decision of the House of Lords in *Digby* v. *General Accident, Fire and Life Assurance Corporation, Ltd.*[23] where the policy holder was injured in a car collision and recovered damages from her own driver for negligence; the rights of the driver against the insurers under the " other driver " clause were held to prevail even in a claim made by the insured in person, a position which could never exist if the claim against the insurers was merely by way of vicarious liability.

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[20] *Yale Law Journal*, note 2, *supra*.

[21] This is still the position in the Republic of Ireland.

To a considerable extent in this way insurers have altered the rules of liability by agreeing to indemnify persons not specifically nominated in their policies, yet requiring the insured to pay the premium for all the insurance. That this meets with the general approval of all the insuring public is obvious, for otherwise the requests for deletion of the cover would virtually have led to the abandonment of this type of extension. It may be argued that this is merely an extra benefit given by the insurer and does not affect the legal position of the insured, but so long as insurers deal with claims against the innominate insureds and indemnify them, yet take the premium from the named insured, they manifestly are amending the rules of liability. Even if the named insured, if sued, would not have been liable yet under a contract in his name the insurers are indemnifying unspecified and totally unknown persons, and even although in other circumstances such persons might not have obtained cover at normal rates.

By virtue of the " other driver " clause the premium paid by any insured may not be representative of the risk incurred, particularly when other members of a family drive a car: the additional risk of the young or inexperienced driver being borne by the policy holder. It is very questionable, however, if this feature has had any influence on the calculations of premiums for motor business as a whole, any more than the increase in the number of vehicles upon the roads. The following tables show the relationship between various factors and third party only motor premiums over a period of years.

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[22] 1933 S.C. 158.

[23] [1943] A.C. 121.

Table 1 gives a comparison between the number of vehicles registered and the number of accidents involving personal injury. In the same table are shown the gross premium incomes of motor insurers for these years or the nearest available, and the comparable value of the £ and the cost of living index. The premiums of course are a very rough guide for they refer to all motor business, not merely third party business for the vehicles registered in the United Kingdom.

Table 2 compares increase of premium rates, from a basis of 100, with the cost of living index and value of the £ in respect of two classes each of private car, commercial vehicle and motor cycles, each for two representative insurance companies. It will be noted that the increases bear no relationship to the decline in purchasing power of the £.

TABLE 1

Year	No. of Vehicles Registered in U.K.	No. of Accidents involving Personal Injury	Total Premium Income of Motor Insurers	Value of the £	Cost of Living
1930	2,273,661	156,793	Not available	100	100
1931	2,200,708	181,077	,, ,,	93	93
1935	2,570,155	195,892	32,832,000	89·1	90
1938	—	195,664	—	—	99
1939	3,148,600	—	35,998,000	96	—
1945	2,552,500	—	33,529,000	64·3	264
1949	—	146,442	—	—	—
1954	5,770,447	195,716	163,400,000	39·6	380

TABLE 2

Year	Cost of Living	Value of £	MAXIMUM INCREASES IN THIRD PARTY PREMIUM RATES											
			Motor Cars				Motor Cycles				Commercial Vehicles			
			Office 'A'		Office 'B'		Office 'A'		Office 'B'		Office 'A'		Office 'B'	
			9 h.p.	12 h.p.	9 h.p.	12 h.p.	200 cc.	400 cc.	200 cc.	400 cc.	15 cwt.	3 Ton	15 cwt.	3 Ton
1930	100	100	100	100	100	100	100	100	100	100	100	100	100	100
1931	93	93	100	100	100	100	100	100	100	100	100	100	100	100
1935	90	89·1	110	110	100	100	366	440	100	100	190	147	129	164
1938	99	96	110	110	100	100	366	440	100	100	190	147	129	164
1945	264	64·3	110	110	100	100	366	440	100	100	190	147	129	164
1954	380	39·6	186	159	203	176	300	481	140	293	232	190	145	184

TABLE 3

Year	No. of Casualties in Road Accidents involving Motor Cars	MOTOR CARS : PREMIUMS			
		Office ' A '		Office ' B '	
		9 h.p.	12 h.p.	9 h.p.	12 h.p.
1930	57,340	100	100	100	100
1931	68,633	100	100	100	100
1935	74,347	110	110	100	100
1938	88,263	110	110	100	100

TABLE 4

Year	No. of Casualties in Road Accidents involving Motor Cycles	MOTOR CYCLE PREMIUMS			
		Office ' A '		Office ' B '	
		200 cc	400 cc	200 cc	400 cc
1930	51,118	100	100	100	100
1931	53,857	100	100	100	100
1935	39,211	366	440	100	100
1938	35,621	366	440	100	100

TABLE 5

Year	No. of Casualties in Road Accidents involving Commercial Vehicles	COMMERCIAL VEHICLES PREMIUMS			
		Office ‘ A ’		Office ‘ B ’	
		15 cwt.	3 Ton	15 cwt.	3 Ton
1930	23,039	100	100	100	100
1931	26,897	100	100	100	100
1935	29,503	190	147	129	164
1938	28,709	190	147	129	164

In tables 3, 4 and 5 the increase in premium rates is compared with the number of casualties for the different types of vehicle and again there is no relationship.

It may be safely assumed that there is no evidence to show that the existence of insurance has led to a greater incidence of liability than if insurance did not exist, even if it has led to a greater number of claims. An increased chance of liability of any marked extent would inevitably have led to an increase in premium rates beyond that called for by the increasing number of accidents and decrease in value of the premiums paid. The evidence shows that proportional to the increase in the cost of living motor premiums have fallen in most cases.

There is no evidence to show that compulsory insurance or the practices of insurers have led to such a change in the law that liability is more likely to accrue than before the days when compulsory insurance led to the vast majority of motor claims being handled by insurers. It is very probable that an analysis of public liability and employers liability premiums would, if it were possible, show a similar stability: in fact, by virtue of the method of presenting accounts such is not possible for public liability premiums and employers liability rating has suffered from the dual disadvantage of a major change in 1948 from workmen’s compensation, and the changes in statutory duty which have increased the duties of employers. It is in these two realms rather than in motor business that insurance has been able to make a marked change in the sphere of liability. Accident prevention, while it does not affect a person's legal liability once an accident has occurred, does reduce the chances of such liability arising. Particularly in connection with the insurance of engineering plant, the routine examination of equipment and machinery by qualified engineering surveyors prevents many accidents which otherwise would have arisen. Stimulated by legislation [24] engineering insurance has spread far beyond the equipment which requires examination by law, but it is particularly in connection with such machinery that its effect is so important. Parliament has required inspections of certain things. Insurance, as so often, has offered a service bordering upon supererogation. In connection with general public liability and employers' liability risks, routine surveys of premises and plant can reveal dangers overlooked by the occupier, principally due to habitual acquaintanceship. The rating of large risks individually, and to a certain extent troublesome small risks, leads the insured to have regard to the compliance with recommendations for improving the risk, and the simple expedient of transferring to another insurer is not so simple when an adverse claims experience is likely to produce a quotation similar to that of the original insurer. To a very considerable extent therefore both by direct advice and inspection, which in the case of engineering insurance consumes the balance of the premium, and by selective rating, insurers make a substantial contribution to the reduction of accidents, particularly industrial accidents, thus lightening the load upon the insuring public. In connection with fire insurance the insurers have carried out a tremendous amount of work to reduce fire waste and a good proportion of this research and these recommendations apply in the field of legal liabilities. Advice on the use of blow lamps may prevent a painter from burning down a building upon which he is working and hence prevent him from incurring an unnecessary liability.

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[24] *e.g.*, Boiler Explosions Act, 1882; Factories Act, 1937.

In motor insurance accident prevention is less feasible, largely due to the individual nature of the control of motor vehicles. Roadworthiness certificates for old vehicles are often required but their value is questionable. The larger fleet risks do approximate more closely to industrial hazards but again accidents are principally caused by the inadvertence of individual drivers. The mechanical condition of the vehicles may be above average but failure of a part of a vehicle is not a major cause of accidents. Attempts by insurers in this field have only a moderate measure of success in the reduction of accidents.

This review would not be complete without reference to the measure of damages paid by insurers in settlements arranged out of court. To a certain extent the awards in court influence insurers. An insurer cannot afford to be too generous in making payments for this is cumulative in effect and prejudicial to economic running of the business. Conversely an insurer cannot afford to be too mean for that will lead to the swift raising of proceedings, and if the attitude is maintained trade unions and solicitors coming to know this approach will commence litigation as soon as the name of the insurer is known. A desirable mean is thus sought but in dealing with the question of compensation for personal injuries such middle way is very wide. Even disregarding contributory negligence the measure of damages for a specific injury is very uncertain. The judges are always very careful in assessing such damages and there is a constant stream of appeals upon this question of quantum to indicate the variety of views possible. Recorded cases are of very little help for they vary so much, it being quite easy to find instances of awards for apparently identical injuries, such as the loss of one thumb, varying by over £1,000 even on a basis of full liability. The insurer must therefore in such cases establish a reasonable figure and only a judge can say that such a valuation is adequate or inadequate. To the claimant there are grave difficulties also, for even if he feels that the amount offered is inadequate it may necessitate litigation to obtain more and then, in the event, he may get less. If a payment is made into court the position for the plaintiff is even more difficult, for failure to take out an adequate payment may lead to him being mulcted in costs, even if he has legal aid. Where there are such variants the insurer naturally veers towards the lower figures knowing that the claimant's advisers will lean the other way. It must not be thought that it is only claimants who are worried by the thought of litigation, for although insurers are more easily able to afford the costs of trial, reasonable economy is required and, except in the unusual circumstances mentioned above among the reasons for contesting claims, an insurer will not usually allow proceedings to be prosecuted unless the amount in dispute bears some relation to the costs to be incurred.

It follows that the more trivial injuries tend to be overpaid both for ease of settlement and also to avoid costs unnecessarily. The more serious injuries receive compensation acceptable to the views of some judges even if less than those of others. In some cases the insurer's offer exceeds the assessment of the judge who ultimately tries the action. It may be safely said that if the average settlement achieved by an insurer was that of a judge it would not be upset in case of appeal. The adequacy in general of insurers' offers is shown by the lack of litigation on the subject compared with the number of claims made.

There is one further aspect of the question of damages where the impact of insurance has led to a direct change in the law. By the Fatal Accidents Act, 1846, a relative of a deceased has a right to damages in respect of the loss incurred through the death of the deceased caused by the negligence of a tortfeasor. It was necessary, however, for any advantage accruing to the relative by reason of the death to be taken into account when computing the measure of damages. A policy of life assurance or a personal accident policy came within such a definition and it was clearly unjust that the liability of a tortfeasor should be reduced by the providence of his victim. In consequence the Fatal Accidents (Damages) Act, 1908, was passed, of which section 1 provides:— "(1) In assessing damages in any action, whether commenced before or after passing of this Act, under the Fatal Accidents Acts, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance whether made before or after the passing of this Act." When the Law Reform (Miscellaneous Provisions) Act, 1934, was passed a similar provision was made in section 1:—"(*2*) Where a cause of action survives as aforesaid [in subsection (*1*)] for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:— (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

In these two Acts the effect of insurance has led to a statutory alteration of the law where the normal interpretation would be bound to lead to injustice. In other respects, however, the influence of insurance is more subtle. It has been shown that the courts, while aware of the existence of insurance, attempt so far as they are able to ignore it when it is not directly material to the point at issue, even although it may be patently obvious that the action is brought purely in an attempt to obtain money from an insurer, as in claims between members of a family. Except between spouses there is no bar to actions between members of a family [25] but seldom will an action be pressed in cases of negligence without an insurer being involved. While the courts do confine themselves to the point at issue, in the multitude of cases settled out of court the influence of insurance is most pronounced. In the methods of dealing with cases insurers impress their interpretation of the law upon the disputes in which they are involved and by the scope of the policies they issue they give cover to a variety of persons not specifically included among the insured named in the contracts. In certain spheres therefore insurance is providing cover to nearly all persons involved in certain operations or domestic relations. While an employer is vicariously responsible for the torts of his employees occurring within the scope of their employment, that employer has a right of indemnity against his employees which his insurer, by virtue of the doctrine of subrogation, can exercise. Normally such a right is not exercised (*Romford Ice and Cold Storage Company, Ltd.* v. *Lister* being a regrettable exception) and the insurer therefore indemnifies the employees equally with the employer. If the employee is sued, either separately or conjointly with his employer, providing that the employer would, if sued alone, be vicariously responsible then the insurer will not infrequently agree to indemnify the employee in person.

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[25] See the speech of Lord Atkin in *Digby* v. *General Accident*, *supra*, p. 137.

In their system of rating and by direct action towards accident prevention, insurers reduce the occasions for liability to arise, both under statute and at common law, and so contribute to the avoidance of much suffering as well as doing their utmost to avoid the calling into operation of the indemnity offered to their insured.

By concluding so many claims insurers set the pattern of damages in many ways and although frequently contemned as parsimonious by claimants and their advisers they keep within that broad band of indetermination concerning the value of any specific injury which, in general, would not be disturbed on review.

In all these actions the insurers, while not subscribing to a belief in universal social insurance at the expense of the insuring community, yet very materially contribute to the happiness and well-being of society, by offering cover, by indemnifying the insured, by paying justified (and some unmerited) claims in adequate measure and by attempting to reduce the incidence of claims by all practicable means: they cannot advance more rapidly than the changes in the law. Before its repeal common employment remained the law even although basically unacceptable to contemporary thought and severely condemned by the House of Lords (particularly by Lords Atkin and Macmillan) in *Radcliffe* v. *Ribble Motor Services, Ltd.*[26] It was entrenched by a century of ratification by the courts and as insurers contract to indemnify their insureds in respect of their legal liability they were obliged to rely upon it. To have ignored it as unjust would have had an adverse effect upon the premium/claims ratio leading ultimately to a request for higher premiums and a natural and justifiable opposition from the insured. The influence of insurance upon legal liabilities hence must be indirect, even although potent, and not by way of direct interference by the insurers.

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[26] [1939] A.C. 215.

CASES AND COMMENT

1. SCOTTISH CASES

NON-COHABITATION ORDER—Reasonable cause for non-adherence.

The case of *Richardson* v. *Richardson*, 1956 S.L.T. 226 (commented on 1956 J.R. 179) left undetermined in Scots law the question as to whether the defender in an action for divorce on the grounds of desertion could successfully plead that he or she had reasonable cause for non-adherence, arising out of conduct of the pursuer, which did not amount to a substantive ground of divorce in itself. Indications were given that the broader concept will probably prevail, but there is as yet no volume of cases to give us a guide as to what would be likely to fall above or below the line of reasonable cause.

The recent Outer House case of *Murray* v. *Murray*, 1957 S.L.T. 41, however, has given one instance of what would not in any event be taken as evidence of reasonable cause. A wife, whose husband was a domiciled Scot, sought to oppose divorce at his instance by virtue of a non-cohabitation Order procured in an English Petty Sessional Court under the Summary Jurisdiction (Married Women) Act, 1895. Under the Act such an Order is said to have the effect in all respects of a decree of judicial separation on the ground of cruelty. Lord Strachan held that mere possession of the Order was not in itself reasonable cause for non-adherence so far as the present case was concerned. The question he had to decide was whether the pursuer's conduct constituted cruelty according to Scots law, and the court could determine that only by itself considering the facts. In the event, the facts were held not to amount to reasonable cause.

K. F.

THE THELLUSSON ACT

In view of the fact that there are comparatively few cases in Scotland dealing with the Thellusson Act, *Carey's Trustees* v. *Carey*, 1957 S.L.T. 309, is of special interest. The facts are that a testator died in 1932, and by his will directed his trustees to hold the residue of his estate in trust " for the son born in lawful wedlock of my nephew R. who shall first attain the age of 21 years." The testator was survived by R. who was then unmarried. R. subsequently married, and his first son to attain majority was born in 1934. Section 1 of the Thellusson Act permits the direction of accumulations under a deed or will for one of four periods of which the second is " the term of 21 years from the death of . . . [the] testator," and the fourth " the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated. . . ." In a competition between the son of the testator's nephew, R., and the testator's heirs *ab intestato* it was conceded that there was an implied direction to accumulate the income of the residue until the residuary legatee attained majority. The question for decision was whether the period during which accumulation was permissible was (a) 21 years from the death of the testator (*i.e.*, the second period), or (b) during the minority of the residuary legatee (*i.e.*, the fourth period). It was decided (1) that the " fourth " period contemplated a direction for the enjoyment of the estate by a liferenter or other intervening interest, and upon the termination of that interest, for accumulation during the minority of the ultimate beneficiary; and (2) that where, as in the case under consideration, there was no such intervening interest, an express or implied direction to accumulate until the majority of a beneficiary was a direction to accumulate *a morte testatoris*, with the result that accumulation was permissible during the " second " period, and that accumulation accordingly became illegal 21 years after the testator's death. At p. 311, the Lord President said, " Where the direction to accumulate only begins to operate, owing to the existence of an intervening interest, some years after the date of the testator's death, the prohibition relating to the fourth period comes into operation, and while sanctioning accumulations during the beneficiary's minority, prohibits any further accumulation after that beneficiary becomes 21 years of age.

" Applying these considerations to the present case, I find that the testator here has directed accumulation *a morte testatoris*. It follows that the prohibition in relation to the second period mentioned in the section, while not striking at accumulation for

21 years from that death, prohibits any accumulation of the income ingathered in any period subsequent to that 21 years. This latter income must fall into intestacy." The Lord President then reviewed the English authorities, and in particular the case *In re Cattell* [1914] 1 Ch. 177, a decision of the Court of Appeal affirming the decision of Neville J. The Lord President points out that in *Cattell* Lord Parker of Waddington draws the same distinction between accumulations directed to begin at the date of the testator's death (where accumulation becomes invalid twenty-one years thereafter), and accumulations in favour of minors which are directed to commence some time after the testator's death and which may operate legally during the minority of that beneficiary.

Finally, the Lord President added that the statement in Henderson on *Vesting*, 2nd ed., p. 314, that " what is prohibited is not merely the accumulation of income for 21 years but any accumulation after the expiry of that period from the testator's death," is too broad because, if the statement were correct, no content would be left for the prohibition regarding the " fourth " period.

There is no reported Scottish case dealing with the applicability of the " fourth " period of the Thellusson Act as contrasted with the " second," and the decision in *Carey's Trustees* and the dicta of the Lord President, and of Lords Carmont and Sorn who agreed with him, will form a valuable addition to the Scottish authorities such as *Smith* v. *Glasgow Royal Infirmary*, 1909 S.C. 1231, 2 S.L.T. 157, and *The Union Bank of Scotland* v. *Campbell*, 1929 S.C. 143, S.L.T. 152, which deal with other aspects of the Thellusson Act.

G. A. M.

DONATIO MORTIS CAUSA

Graham's Trustees v. *Gillies*, 1956 S.C. 437, 1957 S.L.T. 43, is a very important case, serving as it does to clarify the difficult subject of *donatio mortis causa* and to reconcile decisions which have hitherto seemed to conflict. In this case a deceased's repositories were found to contain a sealed envelope on which he had written and signed the words " Only to be opened at my death." It contained a sheet of paper on which he had written and signed the words, " I, J. G., am holding in trust for [a named individual] two deposit receipts for [specified amounts]." His bankers had in their custody two deposit receipts which acknowledged that the bank had " received from J. G. in trust for [the named individual] " the specified amounts. The writing inside the envelopes bore to have been signed on the day following the deposit of the two amounts with the bank. The proceeds of the deposit receipts were claimed by the named individual on the view that the deceased had made to her a *donatio mortis causa*. It was held that she had failed to establish donation *mortis causa* in respect that the terms of the deposit receipts showed that the sums in question had not been delivered to her but, on the contrary, were held in such a way that they could be uplifted only by the deceased or his executors. In the course of the opinions, the doctrine of *donatio mortis causa* was considered and the previous authorities were reviewed. The result of the decision and the dicta seems to be as follows.

1. It is difficult to establish donation in a case where there has been no delivery of the subject said to have been donated, but actual delivery is not indispensable in all cases. In the case of an incorporeal moveable such as a deposit receipt the fact that it was not handed over to the person alleging donation will not necessarily prevent the donation from being effectual, provided (a) that there was something equivalent to delivery such as the insertion of the donee's name in the deposit receipt, and (b) that the intention to make a donation is otherwise established.

In *Crosbie's Trustees* v. *Wright* (1880) 7 R. 823, where the deposit receipt was taken in the name of the donor, his sister and her husband, and the survivor or survivors of them, it was held (a) that to instruct donation it was not necessary to prove delivery of the deposit receipt, and (b) that, although the terms of the deposit receipt did not by themselves establish a donation, the evidence of the persons in whose favour the deposit receipt was taken, as corroborated by the facts and circumstances of the case, was sufficient to do so.

In *Carmichael* v. *Carmichael's Executrix*, 1920 S.C.(H.L.) 195, 2 S.L.T. 285, Lord Shaw, at 205, said with reference to *Crosbie's Trustees*, " it disposes effectively of the plea that delivery of a written document is an absolute essential in all cases where the question is whether a right has been acquired by the third person named as a grantee therein. Delivery is, no doubt, of high importance, but its absolute essentiality in all cases can no longer be affirmed."

In *Graham's Trustees* Lord Sorn, at 455, said, with reference to *Crosbie's Trustees* and the succeeding cases, " To some, the putting of the donee's name into the receipt has had the significance of giving him an ostensible title which permitted the gift to be completed by proof of *animus donandi* without delivery. To others, the insertion of the donee's name has appeared as something which could be treated as equivalent to delivery of the sum of money in the bank. It is the latter way of looking at it which seems to have found favour in the recent cases of *Macpherson's Executrix* v. *Mackay*, 1932 S.C. 505, S.L.T. 352 and *Aiken's Executors* v. *Aiken*, 1937 S.C. 678, S.L.T. 414, and it may have been thought that it kept this type of case more in line with the general doctrine of donation to say, not that delivery is unnecessary, but that the insertion of the donee's name in the receipt operates as constructive delivery of the money." *Crosbie's Trustees* may therefore be regarded as a case of constructive delivery and thus be reconciled with cases such as that of *Macpherson's Executrix* v. *Mackay*, with which it has hitherto seemed to conflict.

In *Graham's Trustees* v. *Gillies* the Lord President, at 449, said, " The title in which the fund is deposited is therefore of crucial importance in the establishment of delivery or its equivalent and it is well settled that a deposit of money in the name of the donor or donee or survivor can operate the necessary transfer to the donee."

2. In the case of corporeal moveables such as cash or banknotes, there must, however, be actual delivery to the alleged donee before a donation can be made effectual.

3. As in the case of an *inter vivos* donation, there is a presumption against donation *mortis causa*, and the onus of establishing it rests upon the person who asserts it.

G. A. M.

HERITAGE—Real burden.

Secretary of State for Scotland v. *Portkil Estates*, 1957 S.L.T. 209 raised a novel problem of real burdens on heritage. A sold land to B in March, 1951, but with the term of entry stated as Martinmas, 1948 (when B had actually obtained possession). B sold the land to C in April, 1951, with the term of entry stated as Whitsunday,

1950. The second disposition contained an obligation on B's part to relieve C of all proprietors' obligations "maturing at or prior to entry," and the first disposition had included an obligation to make a certain boundary stock-proof within one year of the term of entry and to maintain dykes and fences in all time coming. In 1951 the owners of the adjoining lands requested C to make the necessary repairs to render the boundary stock-proof and C did this and then sued B for repayment of the cost of doing so. It was held that the obligation to make the said boundary stock-proof and to maintain the fences and dykes in all time coming was habile to be recognised as a real burden which would run with the lands, but that the specific obligation to repair within the year from Martinmas, 1948, was separable and had indeed become spent before the disposition to B had been executed or recorded; it was accordingly unenforceable and in consequence C could not recover from B the cost of the necessary repairs. The decision seems manifestly reasonable on the simple ground that by the time the obligation became incumbent on B the time for performing it had elapsed. It is rightly stressed by the Lord Justice-Clerk that where, as here, a disposition is executed long after actual possession has been taken, it is only from the date of execution of the disposition that the disponee becomes feudal proprietor with the rights and burdens thereof. The first disposition of 1951 in repeating conditions applicable at the date of sale in 1948 was repeating a spent and now ineffective condition. There is not much authority on this matter of dispositions executed long after the sale to which they are intended to give effect and the case usefully emphasises the distinction between personal conditions of sale and real burdens running with the lands which becomes important in such cases.

D. M. W.

COMPANY—Oppression of minority.

Since section 210 of the Companies Act, 1948, was introduced there have been several cases in which it has been invoked. *Meyer and Another* v. *Scottish Textile and Manufacturing Co. and Others*, 1957 S.L.T. 250 is one of the few successful cases where oppression on the part of other members of the company has been held proved. M. and L. were appointed textile advisers to the S.C.W.S. at the end of the war, when the latter was anxious to embark on the manufacture and sale of rayon materials. For various reasons a private company was formed in which M. and L. had a minority and S.C.W.S. a majority shareholding and the Society made manufacturing facilities at one of its mills available to the company. The Society accordingly had a practical control over the company's operations and nominated three directors to the company's board, who regarded themselves as responsible to the Society for the way in which the company was run. The business flourished and the Society made an unsuccessful attempt to purchase the petitioners' shares at about par, which was much less than their then valuation. The Society then proceeded to try to force down the value of the shares and to transfer the goodwill of the company's business to the Society by diverting business to a new department of the Society, in effect strangling the company by diverting business from its subsidiary to its own new department.

In these circumstances, which are set out in detail in the opinions, the court found that there was oppression not merely from outside but from the nominee directors on the company's board, and conduct intended to prejudice the petitioners' interests in the company, and accordingly an order was made that the Society should purchase the petitioners' minority shareholding at a fixed price which was itself considerably less than the valuation of the shares at the time before the oppression started.

The case is highly instructive on the injustice which may be done to minority shareholders of a subsidiary by directors who represent and act in the interests of the parent company, and it may be felt that possibly rather less than full justice was done to the petitioners by the order that their shares should be bought at £3 15s. when they had been brought down to that value from about £6 by the objectionable conduct of the nominee directors. It does, however, appear a clear case for the invocation of section 210 and few could doubt on the facts that the granting of the remedy was justifiable.

D. M. W.

REPARATION —Basis of award of damages.

Dickson v. *National Coal Board*, 1957 S.L.T. 273 shows how points of interest may still arise from that most familiar kind of action, the claim by a father for solatium and loss of support by reason of his son's death. D.'s son was killed at work in an accident for which the defenders admitted liability. The point of difficulty which arose was whether under the head of patrimonial loss anything should be included in respect of loss of contributions by the deceased to the family income made by him, notwithstanding that the father was not in actual need or likely to be in actual need of the money; the defenders contended that such loss of support was to be considered only if there were *de facto* destitution. The father could claim, it was argued, only if he had a legal claim for support from the son and to the extent to which the law would have recognised that claim. The trend of practice and the cases are all against such a contention and it would have been a radical change in the law as hitherto understood if the court had upheld it, while the logical consequence would have been that in all such cases the pursuer could have recovered only on proof of having lost support *which he or she needed*, whereas the understanding has always been that support lost, whether needed or not, was the measure of the award, and this view has now been affirmed and put beyond doubt.

D. M. W.

ALIMENT— Taxable income or notional income as basis of award.

In *Alexander* v. *Alexander*, 1957 S.L.T. 298 a wife raised an action against her husband for adherence or, if he would not adhere, for aliment, the sum claimed under the latter head being £2,500 per annum. It appeared that the husband had been regularly supplementing his taxable income from capital and thereby maintaining a standard of living higher than he otherwise could have done. Was this factor relevant to the scale of aliment awardable? Lord Wheatley took the view that the wife was entitled to an award which, broadly speaking, would enable her to enjoy the same standard of living as if she had still been living with her husband, and that the determination of the husband's " income " must take into account these regular subventions from capital. This view is consistent with passages in institutional and other authoritative books and, while rather novel, seems eminently sensible and reasonable. In the result his Lordship awarded the wife one-quarter of the husband's notional income, less income tax. In cases such as this, where large sums are involved, the computation is one of some difficulty and it is quite clear that the principle here applied will not extend to every casual capital expenditure or every case where taxable income is inflated from some other source, so that it is not a material infringement of the principle that a proportion of income and not of capital falls to be awarded.

D. M. W.

2. ENGLISH CASES

NEGLIGENCE —Contractor repairing premises —Duty to visitors.

The case of *A. C. Billings & Sons, Ltd.* [1957] 3 W.L.R. 496 underlines that an independent contractor repairing premises does not assume sufficient occupation and control to enable him to take refuge behind the stereotyped categories of duties incumbent upon occupiers of premises. He must defend himself under the ordinary law of negligence. He owes a general duty to all persons who might be expected lawfully to visit the premises he is repairing, to take such care as is, in all the circumstances, reasonable to ensure that they are not exposed to danger. In this case the contractors had closed up the normal access to a house leaving a dangerous alternative one alongside an unguarded area down which the plaintiff fell in the dark and injured herself. It was held that the defendants could not absolve themselves from liability either by giving warning or by reliance on the plaintiff's knowledge. Here the plaintiff was aware of the unguarded area but as there was no alternative route it was reasonable for her to take the dangerous one. It was held that the defendants should have contemplated that, like other visitors, she would do so. On the main question of the duties of contractors the decision follows *Mooney* v. *Lanark County Council*, 1954 S.C. 245, S.L.T. 137.

W. A. E.

NEGLIGENCE —Respondeat superior—Scope of employment.

Staton v. *National Coal Board* [1957] 1 W.L.R. 893 seems, on the face of it, an unfortunate decision. The plaintiff's husband, an employee of the defendants, died following an accident upon the defendants' premises caused by the negligence of T., another employee of the defendants. T. had completed his work for the day and was on his way to collect his wages from the pay office when the accident occurred owing to his negligent riding of his pedal cycle. Finnemore J. held that T.'s going to get his wages on his employer's premises at the place to which they had decided that he should go, was acting in the course of his employment just as much as if he was engaged in his ordinary job of first-aid work. His employers were therefore responsible for the negligent way in which he rode his bicycle. There is certainly authority to support such a result and employers have been held liable for personal negligence towards their workers for injuries that were reasonably foreseeable, and could have been prevented, while the employee was not actually at work. But it does, with respect, seem unjust that the principle of *respondeat superior* should be extended to acts of fellow servants which are so entirely remote from what they are actually employed to do.

W. A. E.

SOLICITOR—Professional negligence—Drafting mutual wills.

The case of *Hall* v. *Meyrick* [1957] 3 W.L.R. 273 helps to indicate what may be professional negligence on the part of a solicitor if he omits to give necessary advice. In 1949 the plaintiff and her husband-to-be, whom she subsequently married, instructed the defendant, who was a solicitor, to draft wills whereby each was to confer benefits on the other. Although the possibility of a marriage was indicated at the interview by the plaintiff's son in a jocular manner, the defendant failed to advise that the marriage would revoke the wills, unless they were expressed to be made in contemplation thereof. The solicitor did not express the wills in this form and when the plaintiff married in 1950 the mutual wills were revoked according to English law without the plaintiff being aware of the fact. Her husband thereafter died intestate. The plaintiff brought an action for damages against the solicitor for the loss of the benefits which had been conferred on her by her husband's will on the ground that he should have advised her of the effects of her marriage on the wills in 1949, and in failing to inform her in 1950 when he was informed of the marrriage, and in 1952, when the plaintiff made a new will, that the wills of 1949 had been revoked. The trial judge found that the defendant was aware that the plaintiff and her future husband were contemplating marriage when he drew their wills, and that he had been negligent in failing to warn them that such a marriage would render the wills as drawn nugatory. He had therefore been in breach of the duty of care which he, as a solicitor, owed to the plaintiff who was his client. On appeal, however, the plaintiff lost her case on a technicality because the case as amended had become time-barred. The opinions of the Court of Appeal on the question of the solicitor's negligence were therefore strictly *obiter*. It was, however, stated that it was not the duty of a solicitor in all cases to draw the attention of persons, who came into his office to draw wills, to the effect of marriage on a will; each case depends on its particular facts. Ormerod L.J. considered that it would be the duty of a solicitor in such circumstances to advise on the effect of a subsequent marriage on the will if the client told him he intended to get married in the near future, or perhaps if that intention came to the solicitor's knowledge in a less direct way.

W. A. E.

CONFLICT OF LAWS—Foreign divorce decree —Fraud.

In *McAlpine* v. *McAlpine* [1957] 3 W.L.R. 698 a wife was successful in obtaining decree nisi of divorce on the ground of her husband's adultery although he had previously obtained a divorce decree in a United States court which had jurisdiction owing to his domicile in America. The wife had resided in England for three years prior to the presentation of her petition and so was able to find jurisdiction under the Matrimonial Causes Act, 1950. She managed to prove that the husband had obtained his previous decree fraudulently by falsely averring that he was completely ignorant of the whereabouts of his wife, although he was in fact in communication with her in England throughout the material time. As the decree had been obtained by fraud it was held to be void, and as the marriage between the parties had accordingly never been dissolved by English law, the wife was now entitled to a decree of divorce.

W. A. E.

PRIVILEGE—Defamation Act, 1952

Section 7 (2) of the Defamation Act, 1952, provides that the defence of privilege in regard to a report of the proceedings at any public meeting shall not be a defence if it is proved that the newspaper has refused to publish "a reasonable letter or statement by way of explanation or contradiction." In *Khan* v. *Ahmed* [1957] 2 Q.B. 149 the plaintiff alleged that an article published by the defendant constituted a serious libel, and his solicitors therefore wrote a letter to the defendant which demanded that he "should arrange to be published forthwith a full apology." Lynskey J. held that this demand was not a request within the meaning of section 7 (2) as a full apology was not the same as a statement by way of explanation or contradiction. A plaintiff is not given any right under this subsection to call for an apology.

W. A. E.

3. PRIVY COUNCIL CASES

VALUATION OF LAND: "Unimproved value": assessment.

Tetzner v. *Colonial Sugar Refining Co., Ltd.* ([1957] 3 W.L.R. 338) was an appeal from a judgment of the Supreme Court of Fiji reversing a decision of the First Class Magistrate's Court at Lautoka, Fiji, relating to a valuation for rating purposes of certain land belonging to the respondent company within the town of Lautoka.

The company came to Lautoka in 1903 and set up a sugar cane crushing mill. The total area of the company's estate amounted to some 2,200 acres, but until 1952 none of that estate was within the town. In that year the boundaries of the town were extended and took in, *inter alia*, 650 acres of the company's land, on which the company had erected a large sugar mill with its subsidiary installations, and on which they had made roads. They had also constructed a wharf adjoining their land. Lautoka, a prosperous sugar town where land values were high, had only one sugar mill—that built on the company's land—on which, to a large degree, the prosperity of the town depended. The mill had been a major factor in creating, and was so in maintaining, the values of land in the town, and if the mill were closed down the present market values of land in Lautoka would drop very considerably.

The valuation which the appellant Sergius Alexander Tetzner, the official valuer in the colony, made was £161,297. The company's appeal against that valuation to the magistrate's court, which was originally confined to mere matters of area and quantum of valuation, was amended to include what was the substantial question in the appeal—whether the present appellant had failed to assess the unimproved value of the land in accordance with correct legal principles on the ground that he had wrongly taken into account factors which should in law be disregarded in assessing such unimproved value. The company claimed that on a correct application of those principles the unimproved value of the lands did not exceed £13,000. The magistrate reduced the valuation to £110,493. The Supreme Court of Fiji, on the company's appeal from that decision, set aside the magistrate's valuation and remitted the proceedings to his court.

The valuation code was contained in the Local Government (Towns) Ordinance, 1947, as amended in 1948. Sections 99 and 100 of the ordinance of 1947, which governed the appeal, provided: " 99. Subject to the provisions of section 98 every rate made and levied by a town council under the provisions of this ordinance shall be assessed at a uniform amount *per centum* on the unimproved value of all rateable land within the town, or within that area of the town to which the rate applies. 100. The unimproved value of land shall be a capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require assuming that the improvements, if any, therein or appertaining thereto and made or acquired by the owner or his predecessors in title had not been made."

The Board stated that it was common ground that what had to be valued was the bare ground which the company occupied, the main issue being on the principles to be applied. The land stripped of its buildings and other physical improvements might be regarded as being in its original condition, so that no question arose of land which had been reclaimed or otherwise made suitable for development purposes. The section drew a clear distinction between the land and the improvements on or appertaining to the land. The improvements pointed to—which had to be made or acquired by the owner or his predecessor in title—were physical improvements of one kind or another and not an improvement, or increase, in the value of the bare land. It was those physical improvements and any value directly attributable to and inhering in them which had to be excluded from valuation. It was an over-simplification to say that the values of the surrounding lands had been increased by the existence of the mill and other improvements on the subject lands. That was merely one, and it might be a relatively minor, factor in the development of the surrounding district. To give every credit to the company, that might be assumed, in the present case, to be due, among other causes, to the enterprise and management of the company, to capital provided or profits applied (other than that sunk in the physical improvements on the land) in carrying on the business, to ability to find or grow raw material and obtain suitable markets and export facilities, and to their good fortune in attracting a suitable and sufficient amount of labour. In other words, the prosperity of the neighbourhood was due to all that went with the carrying on of a successful manufacturing enterprise. None of those factors could be regarded as improvements made or appertaining to the land, and it would be an almost impossible task to expect of a valuer to assign to the physical improvements their quota of contribution to the land values of the locality. But that would be an irrelevant inquiry. What, in the Board's opinion, was required in the present case was that the physical improvements, with any value which they attached to the land on which they were situated, be excluded from the valuer's computation. The land would then be valued as land void of buildings but situated in the community with the amenities and facilities which had grown up around it. There was no objection in the process of valuation to regarding the land as situated in a sugar town. The valuer need not shut his eyes to the fact that there was a sugar manufacturing industry in existence, though he was not entitled to value the sugar mill and its accessories situated on the subject land. The Board agreed with the magistrate that: "if the underdeveloped capital value of a city power house was being assessed one did not assume a city without electricity and all the consequences of the lack of such an amenity." The judge of the Supreme Court had stated: " In my opinion, the benefits given to the neighbourhood by the operations of the sugar mill on the subject land which continue to be a factor in the value of that land should be disregarded in assessing its value." But it was not the "operations" of the sugar mill which had to be disregarded, but the improvements of the sugar mill and its accessories as physical entities. The appeal would be allowed and the judgment of the magistrate's court restored.

SELF-DEFENCE REJECTED: Provocation open on defence evidence.

Joseph Bullard v. *The Queen* ([1957] 3 W.L.R. 656) was an appeal from a judgment of the Court of Criminal Appeal of Trinidad and Tobago dismissing the appellant's appeal against his conviction of the murder of one Eugene Layne. At his trial the appellant relied on the defences of self-defence and provocation. The jury rejected the plea of self-defence, and the trial judge withdrew the issue of provocation from the jury on the ground that the appellant's evidence had not established it. Before the Board it was submitted that the trial judge was wrong in withdrawing the defence of provocation and that accordingly there had been a grave miscarriage of justice.

The Board stated that it had long been settled law that if on the evidence, whether of the prosecution or of the defence, there was any evidence of provocation fit to be left to the jury, and whether or not that issue had been specifically raised at the trial by counsel for the defence, and whether or not the accused had said in terms that he was provoked, it was the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they were not satisfied beyond a reasonable doubt that the killing was unprovoked. The Court of Criminal Appeal took the view that as the jury had rejected the appellant's story on the issue of self-defence there was no evidence on which the issue of provocation could be based, and in so deciding relied on the language which Lord Simon L.C. used in *Mancini* v. *Director of Public Prosecutions* ([1942] A.C. 1 at p. 9). But in the Board's view Lord Simon was not intending to lay down as a proposition of universal application that the same evidence which had been adduced in support of an unsuccessful defence of self-defence could never be relied on in whole or in part as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which could not justify might well excuse. The fact that the jury rejected the defence of self-defence did not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. They (the Board) did not shrink from saying that such a result would have been improbable, but they could not say that it would have been impossible. Every man on trial for murder had the right to have the issue of manslaughter left to the jury if there was any evidence on which such a verdict could be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice, and it was idle to speculate what verdict the jury would have reached. The appeal was allowed and the case remitted to the Court of Criminal Appeal of Trinidad and Tobago with a direction to record a verdict of guilty of manslaughter and to pass sentence accordingly. The Board stated that there was no magic formula for directing a jury that the onus of establishing guilt was always on the prosecution, and cited with approval the language used in *R.* v. *Lobell* ([1957] 1 Q.B. 547, at p. 551).

INCOME TAX: Dividend: "Losses."

Commissioner of Income Tax v. *Williamson Diamonds, Ltd.* ([1957] 3 W.L.R. 663) was an appeal from the Court of Appeal for Eastern Africa allowing the present respondents' appeal against a judgment of the High Court of Tanganyika which had dismissed the respondents' appeal from a decision of the local committee confirming an assessment to income tax which the present appellant had made on the respondents. The appeal concerned the interpretation of section 21 of the Tanganyika Income Tax (Consolidation) Ordinance, 1950, which provided that in certain conditions the Commissioner of Income Tax might, for the purposes of assessing the income of the shareholders of a company, make order that, within prescribed limits, the undistributed profits of a company were to be regarded as having been distributed profits. The section stated: " (1) Where the commissioner is satisfied that, in respect of any period for which the accounts of a company resident in the Territory have been made up, the profits distributed as dividends by that company up to the end of the sixth month after the last date upon which its accounts for that period are required by virtue of the provisions of the Companies Ordinance to be laid before the company in general meeting, increased by any tax payable thereon, are less than 60 per cent. of the total income of the company ascertained in accordance with the provisions of this ordinance for that period, he may, unless he is satisfied that, having regard to losses previously incurred by the company or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of 60 per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the said last date and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this ordinance."

The respondents had a large holding in the shares of another company (referred to as the company), which declared no dividends for the year ending December 31, 1950. The commissioner made an order that 60 per cent. of the total income for income tax purposes should be regarded for tax purposes as having been distributed to the respondents and other shareholders. The Board stated that the commissioner had, before making an order under section 21, to decide whether or not " he is satisfied that, having regard to losses previously incurred by the company or to the smallness of the profits made, the payment of a dividend . . . would be unreasonable." The question to be decided was whether the commissioner had properly interpreted and properly applied those words to the facts of the case. He took the view that the words contained no direction to take capital losses into account; the Court of Appeal thought that there was. It would be seen from what followed in the present judgment, the Board said, that a decision on that point was not necessary to the decision of the case. Having referred to accounts of the company the Board stated that both the courts in Africa had held, and it was clear to their Lordships, that the respondents had failed to establish that the company had sustained a loss of capital, and, as that was the only loss which the respondents sought to establish, they had not established a loss of any kind whatsoever. The case for the respondents was that the company had suffered considerable losses in previous years. There was no assertion of "smallness of profits," the alternative ground appearing in section 21. As the respondents had failed to establish losses of any kind their case failed, and must inevitably fail before the commissioner on the material on which they chose to rely if, as the Court of Appeal ordered, it was sent back for a second decision by the commissioner.

It was argued that some losses were established and that therefore it was for the commissioner to find out for himself whether there had been compensating gains. There was nothing in the language of the ordinance which cast any such duty on the commissioner. For the reasons stated it was unnecessary to decide whether the commissioner should under section 21 take capital losses into account. But it had been fully argued and a decision on it would be helpful in the future application of the section. Section 2 of the ordinance defined the word "loss" as follows: "In this ordinance, unless the context otherwise requires . . . 'loss' in relation to a trade, business, profession or vocation means loss computed in like manner as profits." It was common ground that if that meaning was given to the word "loss" it would bear the meaning it did in every other part of the ordinance and would not include a loss of capital. It was not possible in law to give to the word "losses" any meaning other than that which the defining section gave it unless the "context otherwise requires." To do so would be to disregard and disobey the terms of the statute. The context did not "require" any departure from the meaning already set out, and therefore the word "losses" did not include capital losses. It did not follow from what had been said that the commissioner should not take capital losses into account. The words which gave him a direction mentioned two matters specifically: the first was "losses" (as interpreted above) and the second was "smallness of profits." The commissioner was directed to come to a decision on the question whether "the payment of a dividend or of a larger dividend than that declared" was unreasonable. The form of words used no doubt lent itself to the suggestion that regard should be paid only to the two matters mentioned. But it appeared impossible to arrive at a conclusion as to reasonableness by considering the two matters mentioned isolated from other relevant factors. Moreover, the statute did not say "having regard only" to losses which the company had previously incurred and to the smallness of the profits made. No adequate answer could be given to the question of " unreasonableness " by considering those two matters alone. The statute, by the words used, while making sure that " losses and smallness of profit " were never lost sight of, required all matters relevant to the question of unreasonableness to be considered. Capital losses, if established, would be one of them. The appeal was allowed and the decision of the High Court restored.

CURRENT PERIODICAL LITERATURE

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THE TREATY OF UNION

"In Great Britain today," writes Mr. J. L. Gough in his *Fundamental Law in English History*,[1] "it is a commonplace, on which all lawyers (and politicians) are agreed, that parliament is a sovereign legislature and that therefore there is no such thing as fundamental law in this sense [*sc.* law which cannot be altered or repealed by ordinary legislative procedure] in the modern British constitution." The preface to Mr. Gough's book is dated July, 1954: that is exactly a year after the First Division of the Court of Session delivered judgment in *McCormick* v. *Lord Advocate*.[1a] It must be supposed that the author was unaware of the opinions in that case, and there have been indications that he is not the only person in parts of Great Britain other than that called Scotland whose knowledge is similarly incomplete. Or is it possible that English lawyers and authors simply cannot take seriously a contradiction of something they have been brought up to consider axiomatic? Perhaps the appearance in *Public Law* for summer, 1957, of Professor T. B. Smith's notable paper on "The Union of 1707 as Fundamental Law," read before the International Law Association (Scottish Branch) recently, will cause them to think again.

After a detailed examination of the legal aspect of the circumstances which led up to the Union, Professor Smith concludes, in the first place, that a treaty *jure gentium* was entered into between the kingdoms of England and Scotland, the content of which, however, is to be found rather in "the complex of exchanged Acts of the two Parliaments" than in the Articles of Union agreed upon at Westminster in 1706, and commonly referred to as "The Treaty of Union." But he thinks that the obligations of the treaty are spent, since the parties to it ceased to exist in 1707, and therefore they cannot be appealed to in the event of any alleged violation of the conditions of the treaty. In the second place, the terms of the agreement between the two Parliaments had, and continue to have, effect as fundamental constituent provisions of the Union. Thirdly, the Acts of each of the Parliaments ratifying the Articles of Union were, and are, binding on the subjects within that country alone, as in the case of any other Acts prior to the coming into effect of the Union.

Professor Smith's analysis is persuasive and valuable. In regard to his first point, there is little doubt that, if the terms of the Union are in any way still legally binding, they are so only in a domestic or constitutional sense and not by international law. As to the third point, it may not be strictly correct to say that the pre-Union legislation of the English and Scottish Parliaments

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[1] p. 2.

[1a] 1953 S.C. 396, S.L.T. 255.

"could have" no legislative effect outside the respective jurisdictions of the two Parliaments.[2] But the Acts ratifying the Articles of Union were no doubt not intended to have, and so did not have, extraterritorial force. Thus it is of primary importance to distinguish the legislative measures passed independently by the two Parliaments, which brought the Union into existence, from the agreement between the two Parliaments, which forms the legal basis of the Union. The crux of the matter is, in what sense is this agreement fundamental—only because it forms the basis of the Union, or also because, being the condition upon which the authority of the British Parliament depends, its provisions cannot be altered by that Parliament? Professor Smith is firmly of the latter opinion, and adds his support to the views expressed *obiter* by Lord President Cooper in *McCormick* v. *Lord Advocate*.

He believes that the fallacy of regarding the terms of Union as mere legislation is due, first, to considering the pre-Union English Act [2a] as *the* Act of Union, and, secondly, to assuming without justification that the British Parliament is the English Parliament with Scottish members admitted and has the powers of the former English Parliament.

It is true that it seems to have been the practice in Scotland, probably as a matter of convenient reference, to cite the English Act instead of the Scottish, and that the practice might be misleading. There has also been a tendency among Scotsmen as well as Englishmen to write as if the consequence of the Union was to merge the Scottish Parliament in the English, not only *de facto*, which of course was the case, but also *de jure*, which was not the case. But it is unfair to Dicey, at least, to charge him with these solecisms. When he speaks of "the Act of Union" he clearly means the enactment by parallel legislation in the two countries of the same terms of Union. He is careful, again, to recognise, and even to stress, the bilateral nature of the Treaty, and is far from maintaining that legally the Parliament of Great Britain is only an enlargement of the English Parliament. Nor does he dispute that the Union was intended by its authors to constitute fundamental law binding the British Parliament. What he is concerned to establish is that the two Parliaments were unable to make effectual provision for rendering the terms of Union unalterable by the future Parliament of Great Britain.

The reason given by Dicey in *The Law of the Constitution* [3] for attributing sovereignty to the British Parliament is that "the Parliaments both of England and of Scotland . . . each transfer[red] sovereign power to a new sovereign body, namely, the Parliament of Great Britain. This Parliament, however, just because it acquired the full authority of the two legislatures by which it was constituted, became in its turn a legally supreme or sovereign legislature." It being inherent in the notion of parliamentary sovereignty that one Parliament cannot bind its successors, the two Parliaments of England and Scotland could not confer on the new Parliament created by them any rights other than those they possessed themselves, nor, on the other hand, could they limit its sovereignty any more than previous English and Scottish Parliaments could limit the powers of the two Parliaments which agreed upon the Treaty of Union.

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[2] *Cf.* Jennings, *The Law and the Constitution*, 3rd ed., p. 149.

[2a] 6 Anne, c. 11.

[3] 9th ed., p. 69n.

This reasoning seems to have considerable force, on the assumption that the English and Scottish Parliaments at the beginning of the eighteenth century were both truly sovereign bodies. Subsequently, however, in *Thoughts on the Scottish Union*,[4] Dicey and Rait say that the effect of the Union was to transfer legislative power in Scotland from the Parliament of Scotland, " which had never been either in theory or in fact a supreme or sovereign body, to the Parliament of Great Britain, which inherited both the tradition and, in legislation, the practice of supreme or sovereign authority." Professor Smith remarks that they here assume without argument or explanation that the doctrine of parliamentary sovereignty was extended to Scotland. Yet, if the Scottish Parliament was really non-sovereign, what reason could there be, except for the fact that England was a large and rich country and Scotland a small and poor one, for supposing, in the words of the Lord President in *McCormick* v. *Lord Advocate*,[5] " that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament "?

Is it, however, necessary to conclude that Dicey changed his mind on this point? Not necessarily. *The Law of the Constitution* was written by Dicey, the constitutional lawyer. *Thoughts on the Scottish Union* is the work of Dicey, the political theorist. He is using the word " sovereign " in the later book in a quite different sense from the earlier. That such is the case appears when we examine the grounds upon which in *Thoughts on the Scottish Union* the Parliament of Scotland is distinguished from that of England.

Under what the authors call " the constitution of 1603 " the Parliament of Scotland was the recognised organ through which the King, they say, exercised his legislative authority over his Scottish subjects. Although it took a real part in legislation, Parliament was a non-sovereign legislature, owing to its authority being limited by the existence of two institutions, *viz.*, (1) the Committee of the Articles; (2) the Conventions of Estates.[6] The Committee of the Articles was a parliamentary committee whose duty it was to prepare the measures submitted to Parliament for acceptance or rejection, and, although formally elected by Parliament it was in practice nominated by the King between 1603 and 1690, apart from the revolutionary period of 1638 to 1660. By means of it the King, they insist, in effect controlled the legislative powers of Parliament, and reduced Parliament to something like a court of registration.

Very well, but what has this got to do with the doctrine of parliamentary sovereignty as expounded in *The Law of the Constitution*? Dicey, there, by " sovereignty " is expressing a purely legal conception, and he makes it plain that the legal supremacy of Parliament is not inconsistent with actual limitations on the power of Parliament.[7] The fact, therefore, that between 1603 and 1690 the Scottish Parliament was controlled by the King did not make it any the less sovereign. If the

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[4] pp. 239, 243.
[5] At p. 411.
[6] p. 32.
[7] p. 76.

Estates had not been recognised as, together with the King, legally supreme, why should the Stuart kings have gone to the trouble of exercising their authority through them and not without them? It might just as well be argued that the British Parliament in the twentieth century is non-sovereign, because, as everybody knows, the country is in reality ruled by the Government, which, so long as it has a secure majority, can control Parliament as effectively as any Stuart king. Indeed, Dicey himself draws a parallel in *Thoughts on the Scottish Union* between the Committee of the Articles and a modern Cabinet, which, as he observes, performs most of the functions discharged by the Lords of the Articles, and has even since 1914 received legislative authority more extensive in some respects than was ever acquired by the Lords of the Articles.[8] It need scarcely be said that he would not have agreed that the dominant position of a modern Cabinet in any way affects the legal doctrine of parliamentary sovereignty.

As for Conventions of the Estates, they were essentially meetings of Parliament in another, and informal, guise. It was admitted that a Convention did not enjoy the full authority of a Parliament, and, although it could legislate, such legislation was held to need parliamentary recognition.[9] In *The Parliaments of Scotland* Rait remarks on "the scrupulous care with which Conventions avoided claiming parliamentary powers" and on the respect for a theory of the constitution thus illustrated, "which is a factor in Scottish history deserving of more attention than it has received."[10] That is a reflection that we might wish he had impressed upon the co-author of *Thoughts on the Scottish Union.*

From 1690 to 1707 Dicey and Rait maintain that Parliament and the General Assembly of the Church were both sovereign. Under this system of divided sovereignty Parliament became, "from a legislative point of view, a supreme legislature."[11] Yet, while the vast majority of Presbyterians were prepared to obey Parliament in regard to matters which they deemed temporal, they were prepared to obey the General Assembly on matters which they deemed spiritual. Parliament and Assembly each declared its own belief in its own supreme authority, but were each determined not to allow rash conflict between them. A division of sovereignty, however, did not follow then, any more than it does now, from the fact that the majority of Presbyterians were or are prepared to obey the Assembly rather than Parliament in spiritual matters. In so far as spiritual matters comprise questions of theological dogma or of conscience, they cannot be regulated by Act of Parliament, even if Parliament wished to do so. On the other hand, in so far as questions of ecclesiastical jurisdiction are spiritual matters, the Scottish Parliament from 1690 to 1707 asserted its authority over the Assembly more thoroughly than does the British Parliament today, as may be easily seen by comparing the provisions of the Act of 1690, c. 5, which finally established Presbyterianism in Scotland, with those of the Act of 1921,[12] the latest charter of the Church. In short, if Presbyterians in some matters were prepared to obey the General Assembly rather than Parliament in the period between the Revolution and the Union, they were free in law to do so only because Parliament allowed them. The existence as well as the rights of the Assembly depended on Parliament. Churchmen might claim that the Church was independent of the State, but whatever other kind of merit their arguments might have, they could not discover any legal basis for an autonomous Church.

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[8] pp. 39–40.

[9] p. 43.

[10] p. 152.

[11] p. 93.

[12] 11 & 12 Geo. 5, c. 29.

Accordingly, when Dicey and Rait say that the Parliament of Scotland was never " either in theory or in fact a supreme or sovereign body," they must mean that the *de facto* authority of the Scottish Parliament was never unchallenged. They cannot mean that it was *de jure* anything less than a sovereign legislature. This is a very confusing manner of speech, and it appears to have misled the First Division in *McCormick* v. *Lord Advocate*. Some of the dicta of the Lord President in that case are hard to understand, in particular that " the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law." [13]

It can hardly be denied that in some sense at any rate the Parliaments of England and of Scotland were both supreme legislatures. Otherwise they could not competently have passed the Act, or Acts, of Union. However, neither of them was then considered as possessing unlimited, or legally absolute, powers. To imagine that the British Parliament in the eighteenth century, much less the Parliaments of the two countries which it succeeded, was the same either in theory or in practice as it has become since the nineteenth century is to fall into one of the errors of the Whig Interpretation of History. Even Blackstone spoke of " the immutable laws of nature " and " the absolute rights " of individuals,[14] though perhaps inconsistently. It was not merely statesmen, like Bolingbroke and Chatham, who insisted that there were fundamental rights which Parliament could not lawfully take away. An eminent lawyer, Lord Camden, disputed the power of the legislature to pass the Stamp Act, and the idea of fundamental law only died out, or rather temporarily disappeared, with the victory of the Benthamite principle of utility and the introduction of parliamentary reform.[15] The difference between Blackstone's opinions on the sovereignty of Parliament and the law of nature and those of Erskine is one of emphasis rather than essentials. It is true that Bankton, writing only a short time before Blackstone and Erskine, thought that " the substantial articles " of the Treaty of Union were binding on the Parliament of the United Kingdom. He also thought, however—and this was not an eccentric view at that date—that according to English law Acts of Parliament that were against reason or contrary to Magna Carta were void.[16] It is noteworthy that Erskine does not base his opinion on English, or other, authority, but on considerations of general principle.[17] His words apply retrospectively to the Scottish Parliament just as much as to the British. If there is a distinction between English and Scottish constitutional law in regard to the sovereignty of Parliament, we should have expected that it would have been discovered earlier than 250 years after the Union.

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[13] p. 411.

[14] Comm. 1, 124.

[15] Gough, *op..cit.*, pp. 185, 191, 193.

[16] Inst. I, i, Observ. on the Law of England, 20.

[17] Inst. I, i, 19.

Whether the Parliament of Scotland was sovereign or not, which is perhaps only a matter of definition, it seems clear that it had one characteristic at least of a sovereign legislature, namely that it could not make laws unalterable by itself. A number of instances might be discovered where the Scottish Parliament attempted to limit future Parliaments, for example the Act of 1592, c. 116, establishing Presbyterian Church government. But, as happened when the English Parliament tried to do the same thing, later Parliaments paid no attention. If the British Parliament inherited the powers of the two Parliaments of England and Scotland, was it to be bound by any stipulation, however solemn, contained in a previous enactment of either or both of its predecessors? Professor Smith's theory provides a subtle answer to the question. The British Parliament might, indeed, amend or repeal the Acts implementing the agreement entered into between the two Parliaments. What it could not do was by such legislation to alter the agreed terms of Union, in so far as they were intended to be unalterable, in breach of the agreement, since this would be to destroy the basis of its own existence.

Some perplexities remain, even if the theory is not liable to be called over-subtle. The two Parliaments, no doubt, set out to draw up a constitution which should be binding on the future Parliament of Great Britain. From where did they claim authority to bind their successor? Could the successor not say: "Neither of my predecessors had power to enact laws that were unalterable. How could they do by agreement between themselves what they could not do separately, and why should it follow, because I owe my existence to this agreement, that my hands are therefore tied in perpetuity by provisions contained in it which are completely lacking in validity? Mere assertion that they bind me cannot be enough to make them valid, and if I say I am not bound, who is there with the right to contradict me?" "Fundamental law" is a phrase that would appear to be devoid of meaning in the absence of some way of distinguishing between ordinary law, which can be altered in one manner, and another kind of law which demands an exceptional mode of alteration, or is not alterable at all. How is a distinction to be made, unless these two kinds of law emanate from different sources, the latter being of higher rank than the former? But the Parliaments of England and Scotland did not differ in rank from the British Parliament, and in any event, since they are now extinct, they have ceased to be sources, either separately or together, from which any law can emanate. If it is true that some of their legislation is still the law of the land, in England and Scotland respectively, that is only because the British Parliament has not chosen otherwise.

The position is rather different if we suppose, what in one view at least is true, that the two Parliaments which established the Union acted in the character of representatives of the English and Scottish peoples, or nations. It may then be maintained that the terms of Union constituted fundamental law binding the British Parliament, because they were the conditions of a contract between the two nations. The two nations, as distinct from the two states or kingdoms of England and Scotland, surely continued to exist after 1707 and, it may be, still exist, and the law which emanated from them was, or is, superior in rank to the law emanating from their joint representative for all ordinary legislative purposes, the Parliament of the United Kingdom. The ordinary law might be altered by Parliament at will, but if it attempted to subvert the fundamental law contained in the agreement between the two nations it violated the conditions of its own creation. The consequence of such a breach would be that the nation whose rights were affected would have a legitimate grievance, and in an extreme case might be entitled to treat the agreement by which the Union was constituted as void. But this argument is not open unless the Parliaments of England and Scotland, and the British Parliament, can be regarded as representatives, or trustees, and so under an obligation towards their constituents. If a Parliament is not under any obligation to anybody and can do, legally speaking, whatever it pleases, then it can scarcely be said to violate the conditions of its own creation in any circumstances. Again, unless the two nations which agreed to unite in 1707 in one kingdom still exist, and have not in the course of time become one nation, it is difficult to see how a breach of the agreement can arise, or at least who has now a title or interest to complain of a breach.

The view suggested above receives some support from Dicey, when he describes the Treaty of Union, as also the Act of Union (more accurately the Acts of Union) which embodies it, as " a real treaty or contract between England and Scotland," having the leading characteristic of a private contract, that is to say, conferring benefits upon each of the parties concerned.[18] We must conclude that he means " between the English people and the Scottish people," since obviously countries cannot contract, and that, though he would not have agreed, this " real " treaty or contract gave rise to " real " legal consequences. It is not clear from Dicey's words whether he conceives of this contract between the two countries, or peoples, as still effectively binding them, in the sense, whatever that might be, in which it bound them at the time the Union was formed.

The theory of a contract between two nations, the conditions of which are binding on their common Parliament, admittedly involves a more remote and hypothetical idea of fundamental law than is adopted by Professor Smith. On the other hand, it avoids certain embarrassing practical consequences that seem to follow from his theory. Let us imagine, for instance, what is possibly not so far-fetched a supposition as it would have been a hundred, or even fifty, years ago, that the General Assembly of the Church of Scotland determined to abandon the Presbyterian form of Church government in favour of episcopacy. On the assumption that the terms of the Union, so far as expressly unalterable, constitute fundamental law in Professor Smith's sense, then neither an Act of Parliament nor legislation by the General Assembly could render such a change lawful. Nothing less than a revolution would suffice. But revolutions, unless they are unopposed, are apt to be difficult and hazardous undertakings, and there might be substantial opposition to this change, even though desired by the majority of members of the Church. Much ink at any rate, if nothing else, would probably flow.

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[18] *Thoughts on the Scottish Union*, pp. 182–183.

Whatever problems Professor Smith's theory of fundamental law raises, and the whole subject is far from clear or simple, there is no doubt that he presents impressive arguments in support of his view. He is not so convincing when he maintains, not only that Parliament is bound by the terms of Union, but also that the courts have jurisdiction to deny effect to an Act of Parliament inconsistent with the fundamental law of the Constitution, and would be obliged to hold that such an Act was void.

In coming to this conclusion he relies mainly on the contention that judges would be bound by the terms of the judicial oath they have taken to prefer the fundamental law to a mere Act of Parliament. He also refers to certain cases, in addition to *McCormick* v. *Lord Advocate*, where, however, the judges went no further than to reserve their opinions on the question whether there could be any legal remedy in the Scottish courts if an Act of Parliament were to be passed in violation of the Treaty of Union. Professor Smith has been unable to find any other case where it has even been suggested judicially that the courts have power to review legislation, or indeed any authority of any kind to that effect. He admits that no such power of scrutinising legislation of the Scottish Parliament existed before 1707.

The first case he refers to is *Minister of Prestonkirk* v. *The Heritors*,[19] where Lord Justice-Clerk Hope expressed the opinion (or perhaps did, for it is not clear whether this was his own opinion or not) that an attempt to alter or repeal the provisions of the Union relating to the Church would amount to a dissolution of the Union. He said nothing about a recourse to the courts.

In the first *Auchterarder* case [20] "the opinions of the judges do not suggest," according to Professor Smith, "that they would have upheld legislation purporting to destroy the national Church." This celebrated case arose from an attempt by the Church courts to interfere with the right of Church patronage, which had been abolished in 1690 by legislation of the Scottish Parliament,[21] but restored after the Union by an Act of 1711.[22] There were at least good grounds for maintaining that the Act of 1690 formed a part of the provisions for settling the government of the Church guaranteed by the Treaty of Union, and that the Act of 1711 was therefore a violation of the Treaty. Counsel for the defenders, however, contented themselves with saying [23] that "there might have been room to contend, at least *de recenti*, that the repeal of 1690, c. 23, was an actual infringement on the Treaty of Union." This timid argument, or rather avoidance of argument, was not even mentioned by the judges whether of the majority or of the minority, all of whom proceeded on the assumption that the Act of 1711 was binding on them, and none of whom apparently thought that they had any alternative, however unwilling they might be to injure the Church, to complying with the will of Parliament. Lord Moncreiff, in a dissenting opinion, declared that the independent powers of the Church were even more sacred and inviolable than the powers of the highest civil and criminal courts of the country, and "could not be invaded in any vital point, without a direct breach of what was fundamental and essential in the political state of the United Kingdom."[24] By using the adjective "political" he perhaps meant that a breach would entail only political, and not legal, consequences. In any event, if he and other dissenting judges had believed themselves free to disregard the Act of 1711 they would no doubt have done so, instead of constructing elaborate arguments to circumvent that Act.

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[19] Session Papers, Nov. 1807–March, 1808, at p. 8 of the opinions of the judges.

[20] *Earl of Kinnoull* v. *Presbytery of Auchterarder* (1838) 16 S. 661.

[21] 1690, c. 23.

[22] 10 Anne, c. 21.

[23] At p. 720.

The only notice that appears to have been taken judicially of the suggestion that the Act of 1711 might be invalid as an infringement of the Treaty of Union was in the second *Auchterarder* case in the House of Lords,[25] where Lord Campbell referred to the Act as one "which we must consider binding on us, although it has been said to be *ultra vires* of the British Parliament."

Professor Smith next refers to *Orr Ewing's Trustees*,[26] and finally to *Laughland* v. *Wansborough Paper Co.*[27] The first of these cases, however, had nothing to do with fundamental law or with the right of the judiciary to question an Act of Parliament. It was concerned only with the independent jurisdictions of the English and Scottish courts in relation to one another. In the latter case, an Outer House decision, it was maintained that Parliament had gone beyond its competence in authorising what was described as an illegal attempt, by a sub-rule made by the Rule Committee of the Supreme Court of England, to compel Scottish subjects to submit to the jurisdiction of an English court. The basis of the argument was that, assuming the sub-rule had been validly made under the Judicature Act, 1875, this Act was inconsistent with Article XVIII of the Treaty of Union, in terms of which there is to be no alteration in the laws of Scotland concerning private rights "except for the evident utility of the subjects within Scotland." The Lord Ordinary, after considering whether the procedure embodied in the sub-rule could be said to conflict with "the evident utility" of Scottish subjects, held that there was no sufficient ground for that conclusion. But this is not to say that he thought he was entitled to pass upon the validity of the Judicature Act, 1875, so far as it affected Scotland. He expressed no such opinion, and the other reasons he went on to give for disposing of the case seem to imply that he rejected the idea.

Even if we allow, therefore, that the terms of the Union of 1707 constitute fundamental law binding upon Parliament, no ground exists for stating that the Scottish courts have power to declare an Act of Parliament unconstitutional as a violation of this fundamental law, unless the argument drawn from the judicial oath is accepted. The argument is ingenious and seems to be novel. It has always been believed hitherto that judges are bound by their oaths to apply legislative measures which have duly passed both Houses and received the Royal Assent. "The first duty to which our oaths bind us," Lord

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[24] At p. 791.

[25] *Ferguson* v. *Earl of Kinnoull*, 1 Bell's App. 662 at p. 721.

[26] (1884) 11 R. 600.

[27] 1921, 1 S.L.T. 341.

Gillies said in the first *Auchterarder* case,[28] " is to administer the law of the land, and from this duty nothing can hinder or deter us, but an Act of Parliament—an act by which the law itself is changed." The judicial oath requires judges to do right " after the laws and usages of this realm," and surely among the laws and usages of the realm there is scarcely one which is better established than the rule according to which courts cannot go behind or beyond an Act of Parliament but must give effect to its provisions. We can imagine the painful dilemma of a judge who felt himself obliged by his oath to apply legislation inconsistent with the dictates of what he conceived to be a law of higher rank. But what could he do except prefer, with tears in his eyes, the law which was certain and established to that which was vague and speculative and supported only by the dicta in *McCormick* v. *Lord Advocate*, together with some academic writings prompted by that singular case? Would he not by acting otherwise be exceeding his jurisdiction and possibly running the risk of his removal from office by Parliament, on the ground of wilful misconduct and breach of the duties incumbent on him?[29] The judicial oath itself depends on statute,[30] and it would seem anomalous to use the provisions of the Act as an argument for defying the will of Parliament. Could Parliament, which regulated the terms of the oath to be taken by judicial officers, not equally well alter the terms of the oath, so as to make it clear beyond doubt that the law laid down by Parliament should not in any circumstances be called in question; and might not officers already appointed be also required to take that altered oath?

The fact is that, although the doctrine, or myth, of Parliamentary omnipotence is no longer so fashionable as it used to be, practicable methods of setting limits to the power of Parliament, that is to say its legal as opposed to its actual powers, appear to be altogether lacking. Courts of law might discuss and expound with irrefutable logic rules binding upon Parliament, but Parliament would have no difficulty in evading them, even if it did not simply ignore them. The only effect probably of attempts of this sort would be to lower judicial authority and dignity and perhaps even endanger judicial independence. Submission to the will of Parliament is the condition of that independence, and, after all, provided that obedience is formally complete, it is possible for the courts of law by their power of interpreting statutes to do something at least to ensure that Parliament does not err too much and too often.

SUMMARIES

By S. G. KERMACK, C.B.E., M.A., LL.B., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Journal of International Law. Vol. 51, No. 3. July, 1957.

The *Journal* is, as often, full of useful matter to students. The Editor, Professor Briggs, criticises the conduct of the United States for its refusal to submit the important *Interhandel* dispute with Switzerland to arbitration or conciliation. Professor Gross in an analysis of the Egyptian claim to bar Israel ships from the Suez Canal on the ground of a status of belligerency shows the claim to be due for suppression. A technical article on what is and what is not a treaty provides a good summary on the subject.

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[28] At p. 744.

[29] *Cf. Hagart's Trs.* v. *Hope* (1821) 1 S. 46.

[30] Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 4, 10.

British Tax Review. June, 1957.

Not so long ago a legal journal on taxation would have seemed a strange idea. Even now, no British university teaches the subject, the editor points out, although all American universities do, and the subject has also theoretical value and implications, as well as professional desirabilities. This number, for instance, seeks to probe the question of whether tax concessions have an incentive or dis-incentive effect, with somewhat surprising results. The journal's main purpose is naturally practical and keeps information up to date. Few branches of the law could muster fifty reported cases in six months, this being the number in the table of cases. Study of the journal does not, somewhat surprisingly, show the number of its volume, which is surely important.

Canadian Bar Review. Vol. xxxv. No. 4. April, 1957.

While there is a feeling that Americans tend to be obsessed with what they dub British "colonialism," it is more interesting to register the extent to which they are following our recent developments. The principal article in this number is an article by Professor Franck of New York University on "Nation-Building in the Commonwealth," which is sympathetic. The subject of course appeals to students of public law here as well, as shown by the *Modern Law Review's* article by Mr. de Smith on the Independence of Ghana.

No. 5. May, 1957.

An article on the modification of contracts discusses methods by which courts bound by English doctrines such as consideration contrive to get just results when such doctrines stand in the way. The section dealing with recent decisions may be noted as discussing questions currently relevant in both Britain and America, as the outlawing of Communism; wire-tapping; and conflict of laws on adoption. The Canadian Bar Council naturally have to gather from outlying provinces for their annual meetings and this year they obviously were pleased to find themselves in a centre for winter sports at Montebello, Quebec, which enlivened their meeting here reported.

International and Comparative Law Quarterly. Vol. 6, Part 3. July, 1957.

Many varied tastes will find interest in this number. A historical account of the law in the Sudan describes how English law has been used by the judges appointed in that country. The author has not perhaps traced the fact that, for a short period, one of the present Law Lords (Lord Keith of Avonholm) served as a civil judge there. The Legal Adviser to the British Council gives an account of its dissemination of knowledge of our legal system abroad, perhaps tinged with that British complacency which ignores other countries' belief in their systems. Another article warns us against a recent tendency abroad, particularly in Switzerland and Germany, in deserting the intention of the parties as the deciding influence in choosing the proper law of contract, a tendency the author sees as being only to the advantage of " government-controlled economies." A subject of very current interest is dealt with in an article on International law and high altitude flights, including therein man-made satellites. The new Dutch adoption law is shown to be of interest as completing the Western circle on this subject and of benefiting in some respects from others' experience. Other articles also make *The Comparative Law Quarterly* the sort of reading for those who have wide interests in law.

Law Quarterly Review. Vol. 73. July, 1957.

The fact that the *Law Quarterly* is in its seventy-third year gives considerable interest to the announcement attached to it that a complete index of all that has gone before is now being published, digested by Mr. Peter Allsop. Fortunately this will include the exposition of the cases in the " Notes," which here, as not infrequently, is the more interesting part of the *Review* to us. The articles are more of importance to the English lawyer, though it may be noted that Sir Carleton Allen begins a discussion of Matrimonial Cruelty in this issue.

The Modern Law Review. Vol. xx, No. 4. July, 1957.

The visit of the American Bar Association to Britain should have the result, among others, of making the members of the profession in each country cognisant of the similarities and differences of their organisation and standing. A very full article in this *Review* by Professor Gower and Mr. Price is statistically interesting and draws careful conclusions on the subject. *The American Bar Association Journal* similarly has invited an article by Professor Lawson on the organisation of the legal profession in England (June, 1957). Another topic interesting both countries is a comparative study in the treatment of " Security Risks."

No. 5. September, 1957.

The articles in this number are of general interest. Dr. Glanville Williams concludes his consideration of the question of the master's recourse against his servant for damages payable by him for the servant's negligence and decides that it is not generally justifiable. There is a penetrating discussion of the effect of a parent " withholding his consent " in adoption proceedings. On the conflict of laws question of what law should govern torts, the author comes down on the side of selecting, as the environment of the wrong, the community against which as a background it was committed on the ground that this is what the " reasonable man " feels.

New York University Law Review. Vol. 32, No. 6. June, 1957.

America is more interested and probably more advanced in the question of what is called Pre-Trial Investigation than we are. An article on the practice in New York State is therefore interesting. Thus a party to an action may cause his own deposition or that of his opponent to be taken before trial. In the different field of International Law, Professor Olmstead studies the burning question of nationalisation of foreign property interests by a State and argues that misconceptions which States are prone to make, for their own benefit, of the nature of sovereignty should give place to concepts of responsibility and co-operation. Illustrations are drawn from the Soviet policy in 1917, the discrimination by Mexico against the United States extending over a period, the Iranian Government's action in 1951 and Egypt's nationalisation of the Suez Canal.

Oklahoma Law Review. Vol. 10, Nos. 1 and 2. February and May, 1957.

This *Review* emanates from the University of Oklahoma, and in it particular attention is paid to the law of that state. It is a matter of interest to note in American legal literature how much attention is paid to the local law, while comparisons are often drawn with decisions in other states and in the Federal Courts. Certain subjects are important primarily in certain states. Thus in oil states such as Oklahoma, much attention must be paid to the development of titles and to taxation of property whose wealth consists in subterranean products which by their nature are more mobile under ground than the old-fashioned mineral. The *Review*, however, is by no means limited to local interests as is shown for instance by a study by Professor Julius Paul of Jerome Frank's philosophy of law.

The Western Political Quarterly. Vol. x, No. 2. June, 1957.

Differing from some recent numbers this issue does not present a symposium on any particular subject. Among the problems dealt with are: Formosa as a problem of International Law; whether the American policy in the Philippines should be extended to other Asian countries. American politics are discussed in connection with Fascism, bringing in names which have been heard of in Britain, Huey Long, Father Loughlin, Ezra Pound. A sketch is given of the strange and not unsuccessful technique, which the author calls "political dynamiting," of a public-relations hired agent, Walter Quigley; while the curious ambivalent attitude of the Western States towards Federal interference in their claims to be "frontiersmen" is related in another article. An interesting experiment is made in the *Quarterly* of fifteen two-page addresses from the Annual Meeting of the Western Political Science Association.

Periodicals also received: *Revista Jurídica de la Universidad de Puerto Rico; Jus* (Milan); *Revista Del Foro* (Lima); *Textes Législatifs Étrangers* (Brussels); *Documentation Juridique Étrangère* (Brussels); *Public Law; Revue Internationale de Droit Comparé; The Medico-Legal Journal; La Justícia.*

RECENT LITERATURE

Renton and Brown's Criminal Procedure according to the Law of Scotland. Third Edition. By F. C. Watt, Q.C., M.A., LL.B., Sheriff of Caithness, Sutherland, Orkney and Zetland. 1957. Edinburgh: W. Green & Son, Ltd. Price £5 10s. net.

A former editor of *The Juridical Review* held the view that the task of producing a revised edition of a legal textbook originally written by someone else was a daunting and unsatisfactory undertaking. When invited to produce a fresh edition of a standard textbook he fulfilled the duty by writing a completely new book of unusual excellence, saying it was easier that way. Mr. F. C. Watt, Q.C., the learned editor of the third edition of Renton and Brown's *Criminal Procedure according to the Law of Scotland*, recently published, was probably beset with similar sentiments as he laboured over the many difficulties of bringing this standard textbook up to date. The result has amply justified the diligence and care with which he has discharged his task and in this fresh edition we have a work of the highest quality which places the legal profession under indebtedness to him and his associates, Mr. Stevenson, the Depute Clerk of Justiciary, and Mr. J. C. Patterson, Procurator-Fiscal of Lanarkshire at Hamilton.

This new edition is very much more than a mere catalogue of changes since the previous edition: it is a far-reaching revision with major portions re-written or extended, important new chapters added and much sagacious and practical comment interspersed throughout.

Criminal law and practice is constantly being adjusted and improved, as Lord Cooper pointed out in an address in 1953, and much has taken place since 1928, the date of the previous edition, to keep "the criminal judicial machine in a condition of high efficiency." This has made a substantial reconstruction of Renton and Brown necessary to bring it up to date.

A quick reference to the analytical table of statutes added to this edition shows that almost fifty new statutes, many of them of major, and some of revolutionary, importance, have been noted and incorporated in the text. The provision of this table of statutes is incidentally a minor illustration of the freshness of approach in the preparation of the edition and it should prove helpful to practitioners. The application of the new statutory provisions to existing law and practice is clearly analysed and expounded in the text and this has entailed considerable expansion of the former treatment of the subject-matter.

But the editor has not confined himself to the newest statutes: he has ranged back to the earliest of them and an indication of the widespread nature of his editing will be found on page 118 where he cites the Act 1587, c. 91 (misprinted as 1567), as the basic authority for the fundamental procedure whereunder "The whole evidence must be taken in the presence of the accused and the Jury." In the earlier edition the authority quoted for this doctrine was *Aitken* v. *Wood*, 1921 J.C. 84, 2 S.L.T. 124, and it is satisfactory to find that a proper ascription to the cardinal Act of 1587 is now indicated.

As with statutory alterations during the past thirty years, so with case law. During this seminal period many important judgments have been given and various aspects of criminal law have been clarified. The relative decisions have been closely considered in the course of editorial revisal and incorporated in the text. It is refreshing to notice that the editor has not subserviently accepted every decision as oracular but has considered them afresh in the context of the doctrine under examination. As an example of such editorial review the observations on page 77 regarding the case of *Downie* v. *H. M. Advocate*, 1952 J.C. 37, S.L.T. 159, may be referred to. Here the editor emphasises the apparent unsoundness of a decision which accords facilities to an accused person by grace and favour instead of as a right which he is entitled to assert.

It is inevitable in a work of this kind that a few mild blemishes should creep in, such as the inadequate treatment of the citation of witnesses outwith Scotland, but the outstanding merits of the edition would make elaborate mention of them unrealistic and it will be a general opinion that this admirable textbook can be recommended as a trustworthy guide in the sphere which it is intended to cover.

While, however, the present editor has done much to remove the vestigial evidences that Renton and Brown was originally compiled by two distinguished Procurators-Fiscal and that the trend of its initial usefulness was unconsciously towards prosecutors rather than towards the legal profession generally, there are still, it is thought, some internal traces of this trend which require adjustment.

While the section on Duties of a Prosecutor in considering whether a Criminal Charge should be Made has been streamlined and tidied up it would have been helpful if some observations had been made in a comparable section on Duties of the Accused's Legal Advisers in considering whether a Criminal Charge should be Defended.

Many changes have taken place in the philosophy of social and civic living since Dr. Johnson made his too frequently quoted observations on the duties of an advocate in defending an accused person and some realistic thinking will require to be done to redress the balance and evolve an ethical standard more in keeping with the actualities of modern life. Such a revised standard would preserve to the full the traditional fairness always extended to an accused person but would impose clear duties on legal advisers with a view to preventing waste of judicial time and public moneys where the law and facts palpably justified the charge and only the intransigence of the accused, his knowledge that he need pay nothing for his defence and his determination to have a run for his money (if the expression may be permitted) were responsible for a full-dress trial. All too frequently such criminal non-conformists are trading on the gratuitous advantages of representation by solicitors for the poor, a system urgently requiring modification in the interests of members of a profession whose financial rewards are frequently much less than those of the criminal they feel bound by their present professional code to represent without fee or reward.

In this connection it is disappointing that the incidence of representation by solicitors for the poor in criminal causes is only casually mentioned in this new edition. The topic has been the subject of much heart-burning among members of the legal profession, to whom the observations of Lord Cooper in the case of *Graham* v. *Cuthbert*, 1951 J.C. 25, S.L.T. 58 came as a modest relief, and it would have been helpful if some note had been taken of the implications of this decision which does not appear to receive mention in the text.

It may, accordingly, be relevant to mention that a committee of the Scottish Law Agents Society recently made a report on representation of poor persons in criminal cases in the course of which it pointed out that the essential requirements of poverty and probable cause had to be satisfied before free representation should be made available, and that there was neither legislative nor constitutional sanction for representation by the solicitor for the poor where poverty had not been established.

It is clear that the present system of poor law representation in criminal causes is being abused and that the willingness of the legal profession to endeavour to facilitate the administration of justice by assuming, without real obligation, an onerous burden is tending to corrupt the efficiency of the " criminal judicial machine."

R. MacD.

Scottish Current Law Year Book, 1956—Master Volume; Scottish Current Law Citator 1948–1956. 1957. Edinburgh: W. Green & Son, Ltd. Price (2 volumes) £6 net.

Current Law is indispensable to the lawyer whatever his status in the profession. It provides him each month with " All the Law from Every Source," all the decisions, statutes, statutory instruments, etc., which he wants to and requires to have ready to his hand and of which he had before 1947 or 1948 to find time to keep note. At the end of each year the twelve monthly parts are superseded by a bound volume for the year. As time goes on and from time to time, however, a consolidation of such a work becomes necessary. In England such a consolidation was published in 1952, which had a statement of the law for 1947–1951; a similar volume was not, however, published for Scotland. Ten years have now elapsed since the start of *Current Law*, and it was decided that, in view of the high costs of printing and publishing books at the present day, a master volume instead of a consolidation should be produced. This covers 1952 to 1956 as regards material applicable to the United Kingdom or England only, and 1948 (the first year of *Scottish Current Law*) to 1956 as regards material applicable to Scotland only.

This 1956 volume contains, therefore, not only the usual United Kingdom and English material and the usual purely Scottish section, but also, in skeleton form, all the entries for 1952 to 1955 as regards the United Kingdom and England and all the entries for 1948 to 1955 in the appropriate *Scottish Year Books*, integrated with the entries for last year. Thus a complete picture is presented of the law relating to the United Kingdom or England only for five years, and of that relating to Scotland for nine years with the necessary cross-references to the *Scottish Year Books* 1948 or 1952 to 1955.

The important factor is that whereas in 1952 the English lawyer could get rid of his prior volumes, the Scottish lawyer cannot get rid of any of his and the English lawyer cannot dispense with his from 1952 onwards.

In addition, there is a complete Index of Articles for the whole period 1948 to 1956, and an Index of Books published in 1956. The former is very valuable, and fills a gap much felt in pre-war days.

How does it work? This is quite simple. Let us assume it is a question of a will that is involved, and the exact point is whether an adopted child is included in a bequest to " children." The searcher will find under Wills, sub-title *Construction*, an entry of a Scottish case in 1956 at 13527. Or suppose it is the meaning of " my nephews and nieces " in a will: he turns again to Wills, *Construction*, and he will find under the words " my nephews and nieces " an entry " *See* DAVIDSON'S TRS. *v.* DAVIDSON [1952] 4630 ": he, therefore, turns to his 1952 volume and at entry 4630 of this volume he finds the case. In either case he will also advisedly turn to the Index of Articles at the end of the volume and see whether there is any article bearing on the topic; and he will also look at the case citator in the other volume.

The other volume—*Scottish Current Law Citator 1948–1956*—combines in one volume the tables of cases and statutes, etc., hitherto given yearly in each *Year Book*. It contains all developments in the law in England and Wales from 1947 to 1956 and in Scotland from 1948 to 1956. It comprises (a) a Statute Citator, and (b) a Case Citator. The volume is arranged chronologically. It begins with the Acts of the Parliament of Scotland (of which in the period eleven have been referred to) and then passes on to the Acts of the Parliaments of England, Great Britain and the United Kingdom. It sets out the history of each Act for ten years (in England and Wales) and nine (in the case of Scotland), including the effect of legislation, cases on the construction of the Acts, and statutory instruments made under rule-making powers. In the case of references other than to those in the 1952 Consolidation, they are preceded by a figure, *e.g.*, 54/, showing the appropriate year book.

The Case Citator is in two parts, each in alphabetical order. The first part consists of all cases reported or judicially considered in England 1947–1956, or affected by statute during that period, while the second part is the Scottish equivalent for 1948–1956. Scottish subscribers must consult both parts of the citator. Once again references without a prefixed figure are to the English 1952 Consolidation.

The system for using the volume is easy and the examples given in the Preface of the method in relation to the Roads Improvement Act, 1925, in the case of the Statute Citator, and in relation to *Donoghue* v. *Stevenson* and *Jamieson* v. *Jamieson* in the case of the Case Citator, make it all crystal clear.

Let the reader who is in any doubt read carefully the Prefaces of the two volumes and his footsteps cannot stumble.

It remains to add that both volumes are excellently produced in attractive bindings, and publishers and printers fall to be complimented on having given to the profession two such well set up volumes, which are absolutely invaluable. In these inflationary days they are far from expensive at their price of £6.

G. CAMPBELL H. PATON.

Judicial Corruption in the United Kingdom. By Andrew Dewar Gibb, Q.C., LL.B., Advocate, and of Gray's Inn, Barrister-at-Law, Regius Professor of Law in the University of Glasgow. 1957. Edinburgh: W. Green & Son, Ltd. Price 8s. 6d. net.

This small volume contains fully documented instances of judicial corruption in the United Kingdom. The first English instance is that of Francis Bacon. That the great Lord Verulam, Chancellor of England, was underneath somewhat lacking in principle is well known, but less so are the sordid details of how in his closing years he allowed himself to be corrupted for paltry sums. The Elizabethans were usually rogues on a grander scale. Next come Lord Macclesfield and Lord Westbury in the eighteenth and nineteenth centuries—Lord Chancellors all—and one cannot help speculating on what it was that made this office so open to corruption; perhaps it was the type of ambitious unprincipled man who in the end of the day was best able to last the course of political patronage and reach the Woolsack. Macclesfield was the son of a Staffordshire attorney, was called to the bar, became a Whig M.P., later Lord Chief Justice, then an Earl and finally in 1718, Lord Chancellor of England, which he remained until 1725 when Parliament fined him £30,000 and sentenced him to be imprisoned in the Tower until the fine should be paid. The charges were of the general corruption of the Chancery office involving the loss of suitors' money and the main gravamen of the charge against the Lord Chancellor personally was his trafficking in the sale of Masters' places. It is doubtful, however, if Macclesfield was personally to blame for the general corruption of the system he inherited, nor must one forget that the Scottish clerkships of court were to some extent sold even in Sir Walter Scott's day.

Lord Westbury was a great lawyer and zealous for reform, in the cause of which he made many enemies. He was appointed Lord Chancellor in 1861 but had to resign in 1864 following upon a critical debate on his conduct in the House of Commons. It appeared that his Lordship (like Lord Melville some years earlier in Scotland) had been doling out patronage to all his friends and relations and that certain of the Registrars in Bankruptcy whom he had appointed to office had been absconding with funds. There was no evidence of personal corruption on the part of Lord Westbury who had merely accepted the system of patronage, exercised it badly and then proved too ready to turn a blind eye to what was going on. As one of his biographers wrote (and this might as equally have been applied to Lord Chancellor Brougham): "he was from start to finish strangely deficient in the moral sense . . . he had little to guide him except a by no means infallible perception of what was immediately expedient."

Judicial corruption in Scotland is not represented in this volume by any *cause célèbre* but one is left with the disquieting feeling that at times corruption was accepted and widespread—not only when judges were exercising an administrative function but, worse still, when, like Bacon, they were trying cases. In 1579 a statute was actually passed prohibiting Lords of Session from taking bribes and even in later days there was talk of judge's "peats" and go-betweens. The chief instrument of corruption, however, appears again to have been the system of political patronage, particularly as exercised by the notorious Lauderdale among his relatives and supporters in whose interest or the King's he even interfered in private litigations. Professor Gibb quotes highly compromising correspondence relating to cases *sub judice* between Lauderdale and Lord President Gilmour, whose portrait has recently been hung outside the Second Division court room. Even Viscount Stair does not seem free from suspicion in this respect but one must, of course, remember that even when in office judges in those days had their own political patrons.

Complete security of tenure of office and a strict application of the principle of declinature have changed all this. But Professor Gibb's careful researches in a curious field show that this was not always so and provide a salutary reminder of the fallibility of human nature, of the temptations of high office and of the corrupting influence of too widespread a political patronage.

W. A. ELLIOTT.

The Alexander Hamilton Reader. Selected and edited by Margaret Esther Hall. *The Frederic Maitland Reader.* Edited by V. T. H. Delany, Lecturer in Law, Queen's University, Belfast. The Docket Series, nos. 9 and 10. 1957. New York: Oceana Publications. Price: cloth $3.50; paper $1.00, each volume.

On this side of the Atlantic the fame of Alexander Hamilton seems to have been greatly overshadowed by that of some of his contemporaries and he is not so well known as he should have been. Nor are his works, apart from the papers in the *Federalist*, very widely known. In this volume Miss Hall presents a judicious selection of writings by and about him which presents in brief compass a picture of the man and his achievements and enables one to evaluate his contribution to the stature and stability of the modern United States. Roughly half of the book naturally consists of selections from his contributions to the *Federalist* urging the arguments in favour of ratification of the Constitution. The rest of the book depicts a precocious youth in the West Indies, early diligence and distinction as a military leader and the trusted aide of Washington, before he attained the office of Secretary of the U.S. Treasury at the age of thirty-two, in which position he produced famous reports on credit and manufactures, and set up a national bank. In the intervals of public service, civil and military, he won distinction at the bar. Particularly interesting in this selection is the long letter from Chancellor Kent to Hamilton's widow giving his recollections of Hamilton. A study of this balanced selection brings much more fully and clearly to mind his outstanding achievements in many fields and enables one properly to appreciate him.

The extension of this series to include great figures of Anglo-American law from this side of the Atlantic is a good development and gets off to a good start with Maitland. The reverence and affection inspired by Maitland and his brilliant contributions to historico-legal scholarship make him a happy choice and Dr. Delany has made a pleasant symposium of selections from his writings and papers about him. It is particularly valuable to have available in this collection Hollond's Selden Society Lecture on Maitland, Pollock's appreciation of him and Buckland's personal memoir, Maitland's own Inaugural Lecture and his views on law at the universities, the excellent sketch of English law contributed to the *Encyclopaedia Britannica* and the lecture on English law and the Renaissance, as well as a number of other pieces, longer and shorter, better known and less well-known, from the Collected Papers and more obscure sources. The book should have a wide appeal in this country and will serve admirably to bring to life for the present generation the otherwise shadowy figure so often cited in later footnotes. There are unfortunately a few misprints, particularly in Latin words, but that should not spoil enjoyment of an excellent collection.

David M. Walker.

Equal Justice under Law. By Carroll C. Moreland, Professor of Law and Law Librarian, University of Pennsylvania Law School. 1957. Oceana Publications, New York. Price $2.75.

It is a brave undertaking to seek to present in a book which, shorn of its Forewords, Preface, Epilogue and Appendices, runs to only sixty-five pages, a picture of the American legal system, which is at least as bewildering in its variety of courts and jurisdictions as that of Britain and as little amenable to concise treatment. The basic theme of the book is to show how the legal system works to secure basic justice for all Americans, regardless of means, race, colour or creed but in fact the space available is insufficient really to tackle that problem and an account of the courts and the legal profession does not leave room to consider how efficiently the system works or whether any discrimination exists or other influence which prevents the actual attainment of the ideal justice.

The initial chapters deal with the background, the way in which the law stemmed from English law, the adoption of the Constitution with its constitutional guarantees and of the Bill of Rights of 1791. Then follows a brief description of the state courts, civil and criminal, and of the Federal courts, and a sketch of procedure. After this comes a chapter on admission to the bar and the appointment of judges (which reveals the most remarkable diversity of methods of appointment and of tenure) and a chapter on legal aid, the lawyers' referral plan, and the public defender. Some mention might have been made of costs in this connection. While these chapters are the core of the book, they cover too much ground too quickly and could with great advantage have been lengthened considerably. There is much that needs amplification and it is doubtful if every ordinary reader, either in America or here, can be expected to know without further explanation about law and equity, or the eleven federal circuits, or the connotation of "filing briefs." The legal reader in this country must remain pretty vague about some of these details.

The appendices take up excessive space. There is a reprint of the Virginia Declaration of Rights of 1776, of the Federal Bill of Rights of 1791, and a useful comparative table of the rights and liberties specifically provided for in federal and state bills of rights. Having regard to the main theme the inclusion of these items is understandable but the third would have sufficed by itself. Then there are also given in full the American Bar Association canons of judicial and professional ethics. These take up far too much space and the result could probably have been attained by a mere mention of them in the text with one or two quotations. They are ideals, recommended standards, not necessarily reflecting actual conduct. The bibliography is valuable but probably too extensive for the scale of the rest of the book. Accordingly the prevailing impression is necessarily of a lack of balance in having such a massive apparatus of appendices disproportionate to the small amount of text. The picture it presents to the British reader is sketchy and from too great an altitude, a difficulty imposed by the attempt to put the picture into too small a space, so that the impression it leaves is not very clear. Nevertheless there are many points of interest which may well be unfamiliar here, such as the existence of the court of military appeals which, composed of three civilians, is the highest reviewing body on military law, the lawyers' referral plan, and the very interesting institution of the public defender. But we should have liked to know more of how far the system does in practice effect justice.

DAVID M. WALKER.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

Factory Law. By H. Samuels, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. Sixth Edition. 1957. London: Stevens & Sons, Ltd. Price £4 10s. net.

A Source Book of English Law. By A. K. R. Kiralfy, PH.D., LL.M., of Gray's Inn, Barrister-at-Law, Reader in Law at King's College, London. 1957. London: Sweet & Maxwell, Ltd. Price £2 10s. net.

The Sentence on the Guilty. By Claud Mullins. With an Introduction by the Rt. Hon. Viscount Templewood, G.C.S.I., G.B.C. 1957. Chichester: Justice of the Peace, Ltd. Price 9s. 6d. net.

The Law Quarterly Review. By Peter Allsop, M.A., Barrister-at-Law. Index to Volumes 1–72. 1957. London: Stevens & Sons, Ltd.

A Casebook on Contract. By J. C. Smith, M.A., LL.B., Barrister-at-Law, and J. A. C. Thomas, M.A., LL.B., Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd. Price £2 5s. net.

Yearbook of the International Law Commission 1956. Volume II. Documents of the eighth session including the report of the Commission to the General Assembly. 1957. New York: United Nations. Price $ U.S. 3.00; 22s. 6d. stg.

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